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In The

Supreme Court of the United States

BERNARD N. SHAW and B. JEAN SHAW, COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA, and MARIA GALEANA,

Petitioners,

v.

CITY OF PASCO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits the warrantless inspection of residential rental units mandated under the City of Pasco's ordinance, regardless of tenant consent?

2. Whether the Fourteenth Amendment permits the City of Pasco, without due process of law, to revoke or deny issuance of a business license to the owner of a residential rental unit thereby terminating the owner's rental business?

3. Whether the Fourteenth Amendment permits the City of Pasco, without due process of law, to require residential rental unit tenants to open their doors to administrative inspections?

4. Whether the Fourteenth Amendment permits the City of Pasco to enforce its residential rental unit Ordinance without defining "violation of other applicable codes, rules or regulations"?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are:

BERNARD N. SHAW and B. JEAN SHAW are owners of residential rental units in the City of Pasco. **MANUEL VALA and MARIA GALEANA** are two of Shaws' tenants. **ROBERT LEE GAINES and BILLIE JEAN GAINES** are tenants of residential rental units in the City of Pasco.

COLUMBIA BASIN APARTMENT ASSOCIATION, now known as the Benton-Franklin Rental Owners Association, is a nonprofit corporation organized under the laws of the State of Washington. Its membership consists of individuals and corporations engaged in the ownership and management of rental properties in the City of Pasco as well as other areas of Franklin and Benton Counties, Washington.

CITY OF PASCO, a Washington municipal corporation.

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PETITION FOR WRIT OF CERTIORARI

Bernard N. Shaw and B. Jean Shaw, the Columbia Basin Apartment Association, Robert Lee Gaines and Billie Jean Gaines, Manuel Vala, and Maria Galeana, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (App. 1-25) is reported at 166 P.3d 1157 (Wash. 2007). The judgment of the Court of Appeals (App. 26-37) is reported at 127 Wash.App. 417, 110 P.3d 1200 (2005). The orders granting summary judgment in the Superior Court of Franklin County, Washington (App. 38-48) are unpublished.

JURISDICTION

The Supreme Court of Washington entered judgment on September 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

I. The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. The Fourteenth Amendment of the United States Constitution provides, in part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

I. Factual Background

On July 7, 1997, the Pasco City Council adopted Ordinance No. 3231 (hereinafter the "Ordinance") which amended certain sections of its Municipal Code for Rental-Dwelling Unit Business Licenses. The Ordinance, which became effective January 1, 1998, added new licensing and inspection requirements for residential rental units. App. 124-31.

In the summer of 1998, the City of Pasco (hereinafter the "City"), through its Community Development Department, began its enforcement of the

Ordinance. To initiate the enforcement process, the City notifies the property owners of the scheduled inspections, but gives no notice to the tenants. App. 124-31. The inspections are conducted by a City-employed or City-approved inspector. App. 128-29.

The Shaws received notification from the City that their rental units were subject to licensure and inspection. Acting on instructions from certain of their tenants, including Vala and Galeana, the Shaws did not allow the City-employed inspector to enter those apartments. The Shaws permitted inspections of units occupied by tenants who consented to the inspections and of units that were vacant. The Gaineses are tenants of Robert Lawrence and they also did not consent to entry of the City-employed inspector into their home.

The Ordinance does not provide a mechanism to obtain an administrative search warrant or other court order for entry where the tenants do not consent to the inspection. The City relies on Revised Code of Washington (hereinafter "RCW") 59.18.150 of the Residential Landlord-Tenant Act (hereinafter the "RLTA") which provides landlords the limited right "to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors." App. 121. However, under RCW 59.18.150, the landlord enters for his private

purposes or purposes agreed upon with the tenant, not for City-mandated inspections.

The Ordinance does not provide notice to the tenant of the inspection nor does it provide for a hearing process if the tenant does not consent to the inspection. Further, the Ordinance does not provide for a hearing before the City revokes or denies issuance of a business license to the landlord. Also, without hearing, the Ordinance allows the City to close the landlord's rental business or subjects the landlord to a $500 per day civil fine if he fails to stop conducting his rental business. App. 129-30.

The Ordinance expressly adopted the standards of RCW 59.18.115 of the RTLA. App. 129. The RLTA envisions tenant initiated complaints regarding eight types of hazards which might pose a threat to health and safety. App. 113-14. Unlike the RLTA, the Ordinance added a ninth category of "potential violations of other applicable codes, rules or regulations." App. 127. The Ordinance does not define what is meant by "other applicable codes, rules or regulations." App. 124-31.

II. Procedural History

On January 26, 1999, the City of Pasco filed an action against Bernard and Jean Shaw (hereinafter the "Shaws") to enforce the Ordinance. App. 173-78. On February 5, 1999, Columbia Basin Apartment Association (now known as the Benton-Franklin Apartment Owners Association and hereinafter referred to as the "Association"), along with the

Shaws, other rental owners, and tenants, filed an action against the City in the District Court. App. 160-72.

In the state court action filed by the City, the Shaws filed a motion for summary judgment asserting that the City's license fee was an impermissible tax. The trial court determined that the fee was not a tax and denied the Shaws' motion for summary judgment. The remaining claims were stayed pending the outcome of the federal case.

On December 9, 1999, the District Court granted the City's motion for summary judgment. App. 93-107. The Association, tenants and landlords appealed the ruling to the Court of Appeals.

On September 26, 2001, the Court of Appeals entered its opinion vacating the District Court's summary judgment and holding that the exercise of federal jurisdiction over a federal constitutional claim must be postponed until Washington courts determine whether applicable Washington State law provides the requisite authorization for Washington courts to enforce the ordinance. App. 54-92.

By agreement of the parties the stay imposed in the Franklin County Superior Court action was lifted and the Association and the tenants intervened. App. 50-53. The parties filed cross-motions for summary judgment seeking resolution of their remaining common claims. The Superior Court granted the City's Motion for Partial Summary Judgment. App. 47-49. Thereafter, the City brought a Motion for

Summary Judgment against the Shaws to permanently enjoin the Shaws from conducting their rental business and the Superior Court granted that motion. App. 38-46.

The Shaws, tenants, and the Association appealed these decisions to the Washington State Supreme Court who sent the case down for review by the Washington State Court of Appeals, Division III. On May 5, 2005, the Court of Appeals filed its opinion affirming the summary judgments entered by the Superior Court. App. 26-37. The Shaws, tenants, and the Association petitioned for review to the Washington State Supreme Court, which petition was granted. Oral arguments were conducted on May 9, 2006 and the Court issued its opinion affirming the Court of Appeals' decision on September 13, 2007. App. 1-25.

The majority concluded that the "[t]he inspections contemplated by the ordinance do not amount to state action, nor does the ordinance require any intrusion not already permitted by the RLTA." The majority also concluded that "Pasco Ordinance 3231 is not unconstitutionally vague." App. 15-16. The majority expressed no opinion concerning the additional due process rights asserted by the landlords and tenants.

In his concurrence, Justice Chambers, with whom Chief Justice Alexander joined, recognized that the ordinance "potentially invades two privacy interests." App. 17. He determined that those interests are

that of the landlord (of whom he concluded has a reduced privacy interest) and the tenant (of whom he concluded has the rights provided under the RLTA). App. 16-19.

In his dissent, Justice Saunders, with whom Justice Johnson joined, reasoned that the Ordinance does require state action because even if the "ordinance allows landlords the option to utilize private inspectors approved by the city, private inspectors under the ordinance are simply doing the work of city inspectors." App. 20. Justice Saunders recognized that in order for a landlord to obtain his business license from the City, he must certify his unit meets certain health, safety, and building code requirements. As part of the certification process, the landlord must have his residential units "physically searched by either a city enforcement officer or a private inspector approved by the city." App. 21. The dissent further recognized that the Pasco list of approved inspectors includes Washington licensed structural engineers or architects. "Both are still government licensed and doing the work of a government inspector." App. 21, n. 1.

Justice Saunders found that there was state action, as follows:

> Pasco instigates and encourages these searches, dictates their scope, and examines their fruits. The housing code inspection not only occurs at Pasco's demand, but the ordinance also rigidly lays out who can perform the inspections and the specific scope of the

> inspection. *See* PMC 5.78.020(c). Furthermore, the ordinance requires a landlord to select an inspector that is either directly employed or specifically approved by the city. *Id.* Given such extensive government involvement, the physical search need not be done by an actual city employee to trigger constitutional protections.

App. 22-23.

Justice Saunders pointed out that the majority claims that the private inspectors are "merely furthering the 'private objective of obtaining a certification needed to maintain a business license.'" App. 24. Justice Saunders noted that the inspector's reports are delivered to the city and the city retains full authority to "punitively enforce any perceived code violation." App. 24. Justice Saunders maintained that the landlords are not "first and foremost furthering their *own* ends when they engage in the inspections contemplated by the ordinance," . . . "but are actually furthering the city's ends." App. 24.

REASONS FOR GRANTING THE PETITION

If the decision of the Washington State Supreme Court is left undisturbed, the impact will be far reaching. Given the ever increasing desire of city governments to regulate residential rental units within their boundaries, deciding how to evaluate the constitutionality of administrative inspection processes is an extremely important question of federal law. This

question should be answered by enforcing current federal law or by settling how that law should be applied. This Court should grant certiorari to ensure uniformity on this important recurring and increasingly raised question. A decision by this Court that clearly defines the Fourth Amendment and Fourteenth Amendment standards for evaluating such processes will guide both lower courts and the nation's cities that seek to implement residential rental inspection policies.

I. This Court Should Determine Whether The Fourth Amendment Warrant Requirement Applies When City-Employed Or City-Authorized Inspectors Search Tenant Occupied Residential Rental Premises, Regardless Of Tenant Consent, For Building And Other Code Violations As Part Of A Business Licensing Requirement For Landlords

A. The Washington State Supreme Court's Decision Fails To Follow Existing Supreme Court Decisions Concerning Warrantless Searches

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court recognized the intrusiveness of residential inspections and required government officials to obtain warrants if residents refused to consent. *Id.* at 528-29. This Court specifically held that if a tenant does not consent to a search of his or her home, government officials must obtain a search warrant before conducting an administrative search or inspection. *Id.*

As set forth by the *Camara* Court:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 529 quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948).

In *Camara*, this Court recognized, from a tenant's view, the problem with authorizing warrantless inspections of a tenant's home:

> [W]hen (an) inspector (without a warrant) demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

Id. at 532.

In *Chapman v. United States*, 365 U.S. 610 (1961), this Court stated "[T]o uphold [an entry based only on a landlord's consent], search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the

discretion of [landlords].'" *Id.* at 616-17 quoting *Johnson v. United States*, 333 U.S. at 14.

Numerous other cases have made clear that a landlord's consent is insufficient to authorize a search of a tenant's home; the right to consent or not consent to a search belongs to the tenant. *Black v. Village of Park Forest*, 20 F.Supp.2d 1218, 1222 (N.D. Ill. 1998) referring to *Chapman v. United States*, 365 U.S. 610, 616-17 (1961); *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir. 1990); *see State v. Licari*, 659 N.W.2d 243, 251 (Minn. 2003) ("[g]enerally, a landlord is not seen as having actual authority to consent to a warrantless police search of premises occupied by a tenant"); *see also, United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988) ("a landlord lacks actual authority even when she has 'by express agreement or by implication reserved the right to enter for some special or limited purpose.'"). *See also*, 2 Wayne R. Lafave, *Search and Seizure* § 8.5(a) at 739 (1978).

In countless decisions this Court has recognized the Fourth Amendment's stringent safeguards for the privacy and the security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara*, 387 U.S. at 528, quoting *Wolf v. People of State of Colorado*, 338 U.S. 25, 27 (1949).

This Court has repeatedly acknowledged the sanctity of private dwellings holding to the "centuries-old principle of respect for the privacy of the home" *Georgia v. Randolph*, 547 U.S. 103, 115, 126

S.Ct. 1515, 1523, 164 L.Ed.2d 208 (2006) quoting *Wilson v. Layne*, 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Id.* quoting *Minnesota v. Carter,* 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown." *Id.* quoting *Miller v. United States,* 357 U.S. 301, 307 (1958) (internal quotation marks omitted).

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interest." *United States v. Knights*, 534 U.S. 112, 118-19, 122 S.Ct. 587, 591, 151 L.Ed.2d 497 (2001) quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999).

Over the years, translation of the prohibition against unreasonable search and seizure into workable guidelines has been difficult; however, this Court has stated that "one governing principle, justified by history and by current experience, has consistently been followed, except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been

authorized by a valid search warrant." *Camara*, 387 U.S. at 528, citing e.g., *Stoner v. State of California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951); *McDonald v. United States*, 335 U.S. 451 (1948); *Agnello v. United States*, 269 U.S. 20 (1925).

Camara involved the issue of whether routine administrative inspections without a warrant violate the Fourth Amendment protection against warrantless searches. *Camara*, 387 U.S. at 525. In *Camara*, an inspector with the Division of Housing Inspection of the San Francisco Department of Public Health went to an apartment building with the intent to make a routine inspection for possible violations of the City's Housing Code. The city ordinance provided that the inspectors had the right to enter and inspect upon presentation of proper credentials. Search warrants were not required. Camara, a tenant in the apartment building, refused to allow an inspection of his unit without a warrant. Camara was arrested and charged with a criminal violation of the Housing Code.

This Court held:

> [T]hat such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.

Camara, 387 U.S. at 525 citing *Frank v. State of Maryland*, 359 U.S. 360 (1959).

Thus, in *Camara*, this Court found that administrative searches are intrusions upon the tenant's interests protected by the Fourth Amendment. *Camara*, 387 U.S. at 534. This Court further held that "probable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular building." *Camara*, 387 U.S. at 538. Thus, without a tenant's consent, an inspector may not enter a tenant's unit unless the inspector has probable cause to believe that a condition exists that endangers or impairs the health or safety of a tenant.

This Court's articulated standard for warrantless administrative inspections should be followed. However, the Washington State Supreme Court did not apply the *Camara* standard to the warrantless administrative inspections mandated by the City of Pasco's Ordinance.

Like, *Camara*, the City of Pasco's Ordinance subjects apartment buildings to routine inspections. Under the Ordinance, the City-employed or City-approved inspector searches for building code violations and violations of other health and safety regulations. The Ordinance mandates such inspections without a warrant. In this case, some tenants have refused to consent to the inspections of their residences. The City threatened to revoke or deny

issuance of the rental owners' business licenses if the owners do not open the tenants' apartments for inspection without a warrant. The inspectors have no probable cause to believe that any conditions exist that endanger or impair the health or safety of the tenant.

This Court has admonished that a warrantless search is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (omission in original) (internal quotation marks omitted). In *United States v. Matlock*, 415 U.S. 164, 165-66 (1974), this Court explained one such "well-delineated" exception: that pertaining to "search[es] of property, without warrant and without probable cause, but with proper consent voluntarily given." *Id.*

Coercing an involuntary consent to a warrantless search through the imposition of a penalty is unconstitutional. *See Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 346 (1981) (nor may it be said that the business of residential rental is of such a nature that consent to a warrantless administrative search may be implied from the choice of the appellant to engage in this business). *Id.* citing *United States v. Biswell*, 406 U.S. 311 (1972) (dealer in firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (deal in intoxicating liquor). In determining voluntariness of the consent to the search, the totality of the circumstances must be considered. *Schneckloth*, 412 U.S. at 228.

In the case at hand, the owner of the residential rental premises is threatened with revocation or non-issuance of his business license as well as civil penalties if he does not comply with the City's Ordinance. The Ordinance's inspection scheme insinuates that the landlord gives consent to the searches just by way of doing business within the City. However, such "consent" is not clearly voluntary given the totality of the circumstances under which it must be given.

B. The Washington State Supreme Court Failed To Follow Existing Supreme Court Decisions Concerning When State Action Is Implicated

This Court has commented on the need for the courts to be watchful of and to deter circuitous attempts to avoid constitutional limitations.

> [T]he court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." . . . The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizure both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be

> impaired by judicial sanction of equivocal methods which, regarded superficially, may seem to escape the challenge of Legality but which, in reality, strike a substance of the constitutional right.

Byars v. United States, 273 U.S. 28, 32-4 (1927).

The City of Pasco's Ordinance does, through its circuitous method, invite violation of the Fourth Amendment. In its inspection scheme, the Ordinance requires a landlord to utilize his limited statutory authority (RCW 59.18.150(1) at App. 121) to inspect his tenant's home for the City's purpose of enforcing its building codes and other health and safety regulations.

What [constitutes state action] is a matter of normative judgment, and the criteria lack rigid simplicity . . . No one fact can function as a necessary condition across the board . . . nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

"Careful adherence to the 'state action' requirement" thus "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Brentwood Acad.*, 531 U.S. at 306, quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). The state-action doctrine also promotes important value of federalism, "avoid[ing] the

imposition of responsibility on a State of conduct it could not control." *Id.* quoting *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988).

Although this Court has used many different tests to identify state action, they all have a common purpose. Its goal in every case is to determine whether an action "can fairly be attributed to the State." *Id.* quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

This Court has determined that the existence of state action for constitutional purposes depends on "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972). This Court indicated that the action of a private actor may become the action of the government where the action is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

In *Kirtley v. Rainey*, 326 F.3d 1088 (9th Cir. 2003), the Ninth Circuit recognized four different criteria, or tests, used to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Id.* quoting *Sutton v. Providence St. Joseph Med. Ctr.*,

192 F.3d 826, 835-36 (9th Cir. 1999) and referring to *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002). Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists. *Kirtley*, 326 F.3d at 1092 citing *Lee*, 276 F.3d at 554.

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.* quoting *Lee*, 276 F.3d at 554-55 (internal quotation marks omitted). The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Id.*

Full-time employment would be conclusive of state action for some purposes. *Brentwood*, 531 U.S. at 303 citing *West v. Atkins*, 487 U.S. 42, 50 (1988), accord *Lugar*, 457 U.S. at 935, n. 18.

Here there is actual "state action" when the City-employed inspector is the one conducting the rental dwelling unit inspections and reporting back to the City whether the premises passes the inspection.

The court below stated that there is no state action because the landlord may use a "private" inspector – the court below did not recognize that the "private" inspector actually has to be a City-approved inspector. Further, the court below did not acknowledge that the inspections are scheduled by the City, the extent of the inspection is dictated by the City,

and that the City provides the forms on which the inspection is to be reported. Also, the City requires that the inspection results be reported back to the City for purposes of determining what action the City will take as the result of the inspection – issuance of the business license or further enforcement action.

The requirement of a rental dwelling unit inspection for the purpose of identifying City of Pasco building code violations and violations of other health and safety regulations can only be deemed as traditionally and exclusively governmental function. The City cannot point to any other entity that "traditionally and exclusively" makes rental dwelling unit inspections for these purposes.

Courts have found joint activity sufficient to impute state action in two general patterns: concerted or conspiratorial activity between state and private actors and the existence of a symbiotic relationship. A symbiotic relationship occurs when the government has "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). In *Burton,* this Court found a symbiotic relationship between the public and private entities based primarily on the presence of a mutually beneficial relationship. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), this Court narrowed the application of the symbiotic relationship argument by requiring a showing that the state derive some benefit from the challenged activity (in

that case this Court found no benefit to the state in the termination of school personnel). *Id.* at 842-43.

In the case at hand, there is a symbiotic relationship between the City and the landlords in that the City has the benefit of the inspections (identifying and rectifying building code violations and controlling rental unit business licensing) and the landlord has the "benefit" of being granted a business license in order to continue to conduct his rental business within the City.

To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends. *United States v. Couch*, 378 F.Supp.2d 50, 56 (N.D. N.Y. 2005) referring to *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994). "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of the circumstances." *Id.* at 57 quoting *Skinner v. Rwy. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1980) (citations omitted).

In the case at hand, the City of Pasco's Ordinance requires that the landlord utilize the City-employed inspector or a City-approved inspector to conduct the rental dwelling unit inspection. The City sets the

schedule for the inspection and requires that a City provided or approved form be utilized by the inspector. Further, the results of the inspection are reported back to the City for approval (for issuance of the landlord's business license) or for enforcement action (civil fines for the landlord and mandated repairs, code upgrades, and additional inspections).

The compulsion test considers whether the coercive influence or "significant encouragement" of the state effectively converts a private action into a government action. *Kirtley*, 326 F.3d at 1094 referring generally to *Sutton*, 192 F.3d at 836-37 (canvassing applications of the compulsion test involving the action of private parties required under law or regulations).

In this case, if the landlord wishes to continue to conduct business with the City, the landlord is compelled to open the tenant's door, regardless of the tenant's wishes. This set of facts goes beyond "coercive influence" or "significant encouragement" in that the landlord actually has no choice except to submit to the scheme or not – if not, then to lose his rental business. Irregardless of who enters the premises, they do so under compulsion of government authority and commandment.

The nexus test asks whether "there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Kirtley*, 326

F.3d at 1094-95 quoting *Brentwood*, 531 U.S. at 295 (internal quotations omitted).

The City mandates the scheduling and scope of the inspection; the City maintains oversight of the ultimate result by making the ultimate decision of whether there has been compliance (and therefore issuance of the business license after payment of a licensing fee) or non-compliance resulting in civil fines for the landlord, non-issuance or revocation of a business license, and other enforcement action as determined by the City.

The Washington State Supreme Court found no "state action" in this case primarily because the landlord has the "option" to hire a private inspector. The lower court did not recognize that in order for the City to accept the "private" inspection that the private inspector must be City-approved, utilize the City-approved inspection form, and provide the completed form to the City for review. Further, the City's acceptance of the inspection form dictates whether or not it will issue the landlord a business license.

The inspector conducts the inspections to assist the enforcement efforts of the City. Rather, the inspector is there to search for code violations at the direction of the City and to advance the aims of the Ordinance. The inspector conducts the searches with the sanction and enforcement authority of the City of

Pasco.[1] Accordingly, the Ordinance implicates government action within the ambit of the Fourth Amendment.

II. This Court Should Determine Whether The Fourteenth Amendment Due Process Of Law Requirement Should Be Applied In This Case

A. The Washington State Supreme Court Failed To Address The Fourteenth Amendment Due Process Issue Arising From The City Of Pasco Revoking Or Denying Issuance Of A Business License To A Residential Rental Unit Owner, Thereby Terminating The Owner's Rental Business, Without Due Process Of Law

Due process of law requires that, before property rights can be taken directly or infringed upon by governmental action, there must be notice and opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

> [T]he identification of the specific dictates of due process generally requires consideration

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[1] *See Kuehn v. Renton Sch. Dist. No. 403*, 103 Wash.2d 594, 600, 694 P.2d 1078 (1985) ("It makes no difference whether the search was conducted by the band director, the principal, or the parents. When a private person is acting under the authority of the state, Fourth Amendment protections apply. It is clear that the parents conducted the search with the sanction and enforcement authority of the school officials." (citations omitted)).

> of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

One of the interests protected in this case is the landlord in pursuing a chosen career and making a livelihood.

> It has long been recognized that an interest in a lawful business is a species of property entitled to the protection of due process. . . . Neither may this interest be dismissed as de minimum. A license to engage in a business enterprise is of considerable value to one who holds it.

The protection of due process extends to revocation of a business license. *Herscher v. State, Dept. of Commerce*, 568 P.2d 996, 1002 (Alaska 1977), quoting *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, 524 P.2d 657, 569-660 (Alaska 1974); *see Groten v. California*, 251 F.3d 844, 850-51 (9th Cir. 2001).

The landlords are at substantial risk of being deprived of their right to earn a livelihood renting apartments through the City's Ordinance. The Shaws

have, in fact, been enjoined from doing business for failure to comply with the inspection procedure. App. 38-41. The City's Ordinance compels the landlords to either violate the Fourth Amendment rights of their tenants by insisting on the inspections or lose their business licenses.

B. The Washington State Supreme Court Failed To Address The Fourteenth Amendment Due Process Issue Arising From The City Of Pasco Ordinance Failing To Provide Notice To Tenants Of Inspections And Not Providing A Hearing Process If A Tenant Does Not Consent To The Inspection Of His Home

Similarly, there is nothing in the City's Ordinance which provides for notice to the tenants of the inspection and nothing that provides for a hearing for the tenants or the landlords if the tenants do not consent to the inspection process. If the tenants do not consent to the inspection, the landlord loses his business and, ultimately, the tenant loses his home.

C. The Washington State Supreme Court's Decision Fails To Follow Existing Supreme Court Decisions Concerning The Void For Vagueness Doctrine

The City's Ordinance fails to identify an objective standard against which both owners and tenants might measure their conduct. Subparagraph (9) of section 5.78.020 of the Ordinance permits inspections

for "violations of other applicable codes, rules or regulations." App. 127.

This particular provision, and to a much lesser extent, the eight sections which precede it[2] vest the City-employed or City-approved inspector with the discretion to apply different inspection standards as well as broad discretion as to how they are applied.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court set forth a two-part test to be used for resolving disputes concerning the vagueness of legislative enactments. The two-part *Grayned* test is: (1) laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly; and (2) to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them. *Grayned*, 408 U.S. at 108-109.

In applying the first part of the test, if people of common intelligence must guess at an enactment's meaning and differ as to its application, the law is unconstitutional and is void. *See Hynes v. Mayor and Council of Borough of Oraden*, 425 U.S. 610, 620 (1976).

The void for vagueness doctrine rests on the premise that due process requires laws to be clear

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[2] 1) structural defects; 2) exposure to weather; 3) plumbing/sanitation; 4) lack of water; 5) HVAC defects; 6) hazardous electrical wiring; 7) inadequate units; and 8) fire hazards.

enough to give fair notice to the public as to what activities will subject them to sanctions. *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979).

"The more important aspect of the [void for vagueness] doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "To avoid unconstitutional vagueness an ordinance must 1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and 2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) quoting *Kolender*, 461 U.S. at 357.

In this case, the City-employed or City-approved inspector is left to make his own subjective and objective decisions about the standards to be applied during inspections. This discretion allows for arbitrary enforcement by the inspector. Further, the Ordinance approves inspectors who have different types of code, rule and regulatory backgrounds (i.e. engineer or architect). As written, the Ordinance allows the inspector to interpret each property differently because there is no definition of "other applicable codes, rules or regulations."

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of the State of Washington.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF PASCO,

Respondent,

v.

BERNARD N. SHAW and B. JEAN SHAW, husband and wife, and the marital community composed thereof; COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUELA VALA, and MARIA GALEANA,

Petitioners.

NO. 77195-2

EN BANC

Filed SEP 13, 2007

BRIDGE, J. – In 1997, the city of Pasco enacted Pasco Ordinance 3231, which requires landlords to submit certification every two years ensuring that their rental units have met all applicable health, safety, and building code requirements. The certification must be signed by a city enforcement officer, a certified private inspector, or a Washington licensed private structural engineer or architect. The petitioners, both landlords and tenants, challenge the constitutionality of Pasco Ordinance 3231, arguing that on its face it violates article I, section 7 of the Washington Constitution and the Fourth Amendment to the

United States Constitution. The petitioners also argue that the ordinance is unconstitutionally vague.

We hold that Pasco Ordinance 3231 does not require state action and, therefore, neither article I, section 7 nor the Fourth Amendment is implicated. We also recognize that the ordinance does not require any inspection that landlords are not already permitted to undertake by existing law. Finally, we hold that Pasco Ordinance 3231 is not unconstitutionally vague. We affirm the Court of Appeals.

I

Facts and Procedural History

In the 1990s, the city of Pasco faced problems with a number of substandard rental housing units. For example, the landlords involved in this case owned rental units for which there was no working source of heat. Tenants were told they had to provide their own heat via portable electric space heaters. In addition, kitchens contained no vent, hood, fan, or window, despite the fact that natural gas was used to heat them. In one building, windows were not properly installed, allowing weather to enter the wall. Plumbing was in such disrepair that a bucket had to be used to catch water draining from a bathroom sink. One unit was infested with cockroaches. Some units had unsound wall finishes and warped or buckled walls.

One of the Shaws' tenants complained that they were refusing to make necessary repairs to her apartment. For some time, neither the heat nor the air conditioning worked. The doors did not open unless she resorted to using a knife or plastic card. Both the bathroom and kitchen sinks drained into buckets. The shower wall was collapsing and the kitchen and bathroom floors were rotting. When the tenant demanded either repairs, placement into a better rental unit, or refund of her deposit so she could move out, the apartment manager told her that if she continued to complain, he would have her deported.[1]

The city council sought to take steps to remedy these and similar situations. In July 1997, after public hearings involving testimony from both tenants and landlords, the city council passed Pasco Ordinance 3231. The ordinance regulates business licenses for residential landlords.

The ordinance provides that a landlord must obtain a current business license. As a condition for the issuance of a license, the landlord must provide a certificate of inspection ensuring that:

> the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that

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[1] This provides a good example of why some tenants may hesitate to report housing code violations.

endanger or impair the health or safety of a tenant including:

(1) structural members that are insufficient in size or strength to carry imposed loads with safety;

(2) exposure of the occupants to the weather;

(3) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury;

(4) lack of water, including hot water;

(5) heating or ventilation systems that are not functional or are hazardous;

(6) defective, hazardous, or missing electrical wiring or electrical service;

(7) defective or inadequate exits that increase the risk of injury to occupants;

(8) violations that increase the risk of fire; or

(9) violations of other applicable codes, rules or regulations.

Clerk's Papers (CP) at 296. Landlords must provide a certificate of inspection during a preassigned three-month period every two years. The certificate must be based on the physical inspection of the dwelling not more than 90 days before the date of the certificate. Compliance must be certified by one of the following:

> (1) a City of Pasco Code Enforcement Officer;
>
> (2) inspectors certified by the United States Department of Housing and Urban Development for grant-required inspections;
>
> (3) certified private inspectors approved by the City upon evidence of completion of formal training . . . ;
>
> (4) a Washington licensed structural engineer;
>
> (5) a Washington licensed architect;

CP at 297. All certifications must be submitted on forms provided by the city or approved by the federal Department of Housing and Urban Development. The city provides the services of its building inspector free of charge, or the landlord can use a private inspector that meets one of the qualifications listed above. Nothing in the ordinance prevents additional inspections pursuant to RCW 59.18.115 at the request of the tenant. Landlords that fail to comply are guilty of a code infraction, subjecting them to a fine of up to $500. A separate code infraction can be found for each day that the violations continue.

In 1999, the Shaws failed to provide the city of Pasco with a certificate of inspection for some of their rental units. As a result, they were not issued a business license, but they continued to rent the affected units. The city filed an action against the Shaws in superior court. In response, the Shaws asserted that tenants occupying some of their rental

units had refused to permit "unauthorized searches of their home." CP at 8. The Shaws argued that absent a warrant, they could not permit a third party to inspect their tenants' homes. They also argued that Pasco Ordinance 3231 violates the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Washington Constitution because it requires inspection of rental units even if the tenants do not consent and the ordinance is unconstitutionally vague.

An association of landlords, some tenants, and the Shaws then filed an action in federal district court, challenging the constitutionality of the Pasco ordinance under the Fourth Amendment. The state case was stayed during the pendency of the federal case. The federal district court granted summary judgment to the city, concluding that landlords and their privately engaged inspectors were not state actors and therefore their inspection pursuant to the ordinance did not violate the Fourth Amendment. On appeal, the Ninth Circuit vacated the district court's order, holding that the federal court should not have exercised its jurisdiction until the state court had resolved the challenges. *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 806-07 (9th Cir. 2001). The Ninth Circuit ordered the federal district court to stay federal proceedings until state courts determined the validity of the ordinance.

The Franklin County Superior Court then allowed four tenants to intervene in the state case in order to raise constitutional challenges to the

ordinance under the Fourth Amendment and article I, section 7. The intervenors filed their own motion for summary judgment, arguing that Pasco Ordinance 3231 violates article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The superior court then granted summary judgment to the city, concluding that Pasco Ordinance 3231 does not invade tenants' privacy rights under either the United States or Washington Constitutions. Specifically, the trial court concluded that the ordinance did not transform landlords and their private inspectors into state actors, and limited inspection for the purpose of determining compliance with housing codes did not amount to an unreasonable search.

The Shaws and the tenants petitioned for direct review in this court. We denied direct review and transferred the case to the Court of Appeals. *City of Pasco v. Shaw,* 127 Wn. App. 417, 421-22, 110 P.3d 1200 (2005). The Court of Appeals affirmed, also concluding that the ordinance is not unconstitutional because the landlords and their private inspectors are not state actors and the tenants' privacy rights are not offended by the required inspections. The Court of Appeals also held that the ordinance is not unconstitutionally vague. Petitioners sought review in this court, which we granted.

II

Analysis

The Shaws and the intervenors have challenged the constitutionality of Pasco Ordinance 3231 on its face. In order to prevail, they must show that the ordinance is unconstitutional beyond a reasonable doubt and there are no factual circumstances under which the ordinance could be constitutional. *Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wn.2d 622, 631, 71 P.3d 644 (2003); *Tunstall v. Bergeson,* 141 Wn.2d 201, 221, 5 P.3d 691 (2000). Whether the petitioners have met this high burden is a question that we review de novo. *Shoop v. Kittitas County,* 149 Wn.2d 29, 33, 65 P.3d 1194 (2003).

The Fourth Amendment to the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." Under the Fourth Amendment, to determine whether a search has occurred, we ask whether the government action invaded a "justifiable, reasonable, or legitimate expectation of privacy." *State v. Carter,* 151 Wn.2d 118, 127, 85 P.3d 887 (2004).

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 bestows upon Washington citizens protections that are "qualitatively

different from, and in some cases broader than, those provided by the Fourth Amendment." *City of Seattle v. McCready* (*McCready* I), 123 Wn.2d 260, 267, 868 P.2d 134 (1994). Article I, section 7 recognizes privacy interests that Washington citizens have held or should be entitled to hold, free from government intrusion. *Carter,* 151 Wn.2d at 126.

In 1994, this court examined a Seattle residential housing inspection program in which city inspectors sought to inspect rental properties f housing code violations over tenant objection. *McCready* I, 123 Wn.2d at 264-65. This court concluded, in the context of inspection by government officials, that nonconsensual inspection of residential rental units invaded the tenants' private affairs and that no authority of law supported warrants to search for housing code violations absent probable cause. *Id.* at 271, 280-81. In response, the city began to obtain administrative inspection warrants supported by probable cause that a housing violation had occurred. *City of Seattle v. McCready* (*McCready* II), 124 Wn.2d 300, 309, 877 P.2d 686 (1994). Then in *McCready* II, we explained that municipal courts had no inherent authority to issue administrative search warrants, and thus, they had to rely on an authorizing statute or court rule. *Id.* at 309. No statute or court rule allowed administrative inspection supported by probable cause to believe a *civil,* but not a criminal, infraction had occurred. *Id.* In *Bosteder v. City of Renton,* 155 Wn.2d 18, 23-24, 117 P.3d 316 (2005), we concluded that the same result is required under the Fourth Amendment.

Administrative search warrants must be supported by an authorizing statute or court rule or by allegations of a *criminal* violation supported by probable cause. *See id.* at 29.

Because the *McCready* cases and *Bosteder* involved searches conducted by city inspectors, these cases do not answer the question presented here, whether the Fourth Amendment or article I, section 7 is violated where a landlord and a privately engaged inspector inspect a rental property for code violations that impact health and safety.

Both the Fourth Amendment and article I, section 7 provide strict privacy protections where invasion of a person's home is involved. However, unless the person conducting the inspection is a state actor, no violation of these constitutional provisions occurs. *E.g., Carter,* 151 Wn.2d at 124; *In re Pers. Restraint of Maxfield,* 133 Wn.2d 332, 337, 945 P.2d 196 (1997). It is the party asserting the unconstitutionality of an action that bears the burden of establishing that state action is involved. *E.g., State v. Swenson,* 104 Wn. App. 744, 754, 9 P.3d 933 (2000) (citing *State v. Walter,* 66 Wn. App. 862, 866, 833 P.2d 440 (1992)).

Whether state action has occurred depends on the circumstances of a given case. *E.g., id.* (quoting *State v. Clark,* 48 Wn. App. 850, 856, 743 P.2d 822 (1987)); *see also State v. Thetford,* 109 Wn.2d 392, 401, 745 P.2d 496 (1987). A person is a state actor if that person functions as an agent or instrumentality

of the state. *Walter,* 66 Wn. App. at 866 (citing *Clark,* 48 Wn. App. at 856). In making this determination, Washington courts look to "the capacity in which [a person] acts at the time of the search" rather than to the person's primary occupation. *State v. Ludvik,* 40 Wn. App. 257, 262-63, 698 P.2d 1064 (1985). "Critical factors . . . include [1] whether the government knew of and acquiesced in the intrusive conduct *and* [2] whether the party performing the search intended to assist law enforcement efforts *or to further his [or her] own ends." Swenson,* 104 Wn. App. at 754 (alterations in original) (emphasis added) (quoting *Clark,* 48 Wn. App. at 856).

The Pasco ordinance requires a landlord to submit a certificate of inspection, but it does not authorize the city itself to search for housing violations. The petitioners point to *Kuehn v. Renton School District No. 403,* 103 Wn.2d 594, 600, 694 P.2d 1078 (1985), in which we held that parent chaperones of a high school student trip acted with enforcement authority of school officials when they searched student bags. However, under the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license. Significantly, if a private inspector finds code violations, the ordinance does not require the inspector to turn his or her findings over to the city. Thus, a landlord can remedy any violations found by an independent inspector, submit to another inspection, and obtain a

license based on the new inspection, without the city ever being notified of the original violations. The city insists only upon the certificate that an inspection has been successfully completed. Landlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance. In sum, the petitioners have not met their burden of showing that landlords and their privately engaged inspectors are state actors. Absent state action, neither the Fourth Amendment, nor article I, section 7 was violated.

We also note that RCW 59.18.150(1) already provides that a tenant cannot unreasonably withhold consent to the landlord to enter into the rental unit in order to inspect the premises, and the act allows some third parties to accompany the landlord upon entrance. In *Kalmas v. Wagner,* 133 Wn.2d 210, 219-20, 943 P.2d 1369 (1997), this court reasoned that if the scope of a landlord's entrance does not exceed the legitimate purposes contemplated by the Residential Landlord-Tenant Act of 1973 (RLTA), no unreasonable search has occurred. Of course, the RLTA provides some limitations to landlord entry. A landlord, accompanied by his or her chosen inspector, cannot enter without at least two days' notice to the tenant, and they must enter at a reasonable time. RCW 59.18.150(5). In addition, the inspection necessary to fulfill the requirements of the Pasco ordinance is limited to a survey for the ordinance's habitability requirements. Neither landlords nor their privately engaged inspectors are permitted to search a tenant's belongings or

search for evidence of a crime. The ordinance contemplates no assistance to law enforcement in the form of uncovering any illegal acts on the part of tenants. *See Swenson,* 104 Wn. App. at 754. The inspection required by Pasco Ordinance 3231 does not exceed what is already allowed by the RLTA.[2]

Under these circumstances, entry into a rental unit necessary to obtain a certificate required to renew a business license is a private action that is intended to benefit the landlord. Nor have the Shaws shown that the ordinance transforms landlords and their chosen inspectors into state actors. There being no state action, there is no article I, section 7 or Fourth Amendment violation.[3] Furthermore, the

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[2] Petitioners point to the provision of the RLTA allowing fire officials to seek a warrant for inspection upon a showing of probable cause that criminal fire code violations exist in a specific dwelling. RCW 59.18.150(2). Petitioners claim that this provision provides an example of "authority of law" necessary to justify invasion of tenants' privacy interests, and absent a similar provision, city inspectors cannot enter rental units without tenant consent. However, this argument ignores the fact that the Pasco ordinance requires landlords to provide certification from privately engaged inspectors. No city official is authorized to enter the rental dwelling under the ordinance.

[3] In addition, in order to successfully mount a facial challenge, the petitioners must show there are no factual circumstances under which the Pasco ordinance could be constitutional. *Citizens for Responsible Wildlife Mgmt.,* 149 Wn.2d at 631; *Tunstall,* 141 Wn.2d at 221. The Shaws ignore the fact that landlords can choose the time of the inspection within a six-month window. Pasco Ordinance 3231, § 2(b) (assigning a three-month renewal period and allowing physical inspection within 90 days prior to the certificate of inspection). Under these

(Continued on following page)

Pasco ordinance does not require anything that is not already permitted by law.[4]

Finally, petitioners argue that Pasco Ordinance 3231 is unconstitutionally vague. We presume that ordinances are constitutional and the party challenging the ordinance must prove vagueness beyond a reasonable doubt. *City of Seattle v. Eze,* 111 Wn.2d 22, 26, 759 P.2d 366 (1988). An ordinance is unconstitutionally vague if "persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'." *Haley v. Med. Disciplinary Bd.,* 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). The ordinance need not meet impossible standards of specificity. *Eze,* 111 Wn.2d at 26. An ordinance is constitutional if it provides adequate notice of prohibited conduct and

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circumstances, at least some landlords will be able to conduct inspections between tenancies, thereby eliminating any tenant involvement at all.

[4] We also recognize that as a condition of licensing, a licensee often must demonstrate to the government, or to a certified or accredited private inspector, that he or she can meet the minimum licensing standards. For example, prior to license renewal, nursing homes are subject to surprise inspection of every part of the premises and examination of all records. RCW 18.51.091. Similarly, family home child care providers are subject to licensing inspections. *See* WAC 388-296-0250. If we were to hold Pasco Ordinance 3231 unconstitutional, doing so might tempt licensees to thwart licensing regulations by using article I, section 7 or the Fourth Amendment as a means to reduce the costs of complying with health and safety regulations to the detriment of some of our most vulnerable citizens.

prevents arbitrary, discretionary enforcement. *Haley,* 117 Wn.2d at 739-40.

As noted above, Pasco Ordinance 3231 lists nine habitability requirements that landlords must certify. The petitioners challenge the ninth requirement: that no conditions exist that constitute "violations of other applicable codes, rules or regulations." CP at 296. The petitioners claim that this requirement gives inspectors broad discretion to choose and apply unspecified standards.

However, the language of the ordinance is not so vague that an ordinary person would not understand its meaning. The requirement at issue occurs in the context of a list of specific habitability requirements and it is limited to "applicable" codes, rules, and regulations. Arbitrary discretion is limited by the standards set forth in relevant housing codes and regulations. The petitioners have not met the heavy burden of showing vagueness beyond a reasonable doubt.

III

Conclusion

Pasco Ordinance 3231 was enacted in an attempt to protect tenants and nearby property owners from dangerous and unhealthy housing conditions. The inspections contemplated by the ordinance do not amount to state action, nor does the ordinance require

any intrusion not already permitted by the RLTA. Finally, Pasco Ordinance 3231 is not unconstitutionally vague. We therefore conclude that the petitioners have not met their heavy burden of proving Pasco Ordinance 3231 unconstitutional and we affirm the Court of Appeals.

/s/ Bridge, J

WE CONCUR:

/s/ C Johnson J	/s/ Owens, J
/s/ Madsen, J.	/s/ Fairhurst, J.

CHAMBERS, J. (concurring) – I cautiously concur because I do not read the majority as eroding the important principles embodied in article I, section 7 of our constitution and as explained in *City of Seattle v. McCready,* 123 Wn.2d 260, 270, 868 P.2d 134 (1994). Under our state constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. Article I, section 7 protects "'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass'" without a warrant issued by a neutral magistrate and supported by probable cause. *McCready,* 123 Wn.2d at 270 (quoting *State v. Boland,* 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). At a minimum, a city

ordinance that authorizes inspection "warrants" without probable cause does not provide the "authority of law" as meant by our constitution. *McCready*, 123 Wn.2d at 271-72.

But the city of Pasco clearly drafted its ordinance with *McCready* in mind. This ordinance does not require state agents to make the inspections and does not use the fig leaf of probable-causeless "warrants" to authorize home invasions. Instead, Pasco property owners must prove that their rental units are habitable as a condition of doing business in the city and are free to contract with private inspectors. *See* PMC 5.78.020(C). On paper, at least, this is a critical difference. Still, we should always be skeptical when any government seeks to invade any person's home, no matter how well meaning the exercise of police power may be.

I am cautious because this ordinance potentially invades two privacy interests. The first is that of landlords who are in the business of renting apartments. I recognize that the city of Pasco found substandard housing was a growing problem, requiring increased regulation and enforcement in response. Housing is a heavily regulated industry, and I conclude that landlords have a reduced privacy interest. Many housing code provisions go to the very structure of the buildings rather than to traditionally understood private affairs. *See, e.g.*, WAC 51-50-2106.1 (seismic requirements); WAC 51-50-1015.1 (exits); *but see* WAC 51-50-1208.2, .3 (minimum room sizes); WAC 51-50-1101.2.6 (maximum/minimum distance of

shelves within toilet compartments from floor). Many industries such as restaurants and day care providers are pervasively regulated, which even in our state may create a reduced expectation of privacy. *See generally State v. Thorp,* 71 Wn. App. 175, 178, 856 P.2d 1123 (1993) (citing *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)). Courts in Washington have even allowed commercial fishermen to be criminally prosecuted for refusing to allow a warrantless searches of their boats because of similar reduced expectation. *State v. Rome,* 47 Wn. App. 666, 670, 736 P.2d 709 (1987). I conclude that landlords who offer housing for rent should reasonably expect that the government will require that housing be habitable and meet minimum standards.

The other privacy interest potentially invaded is the privacy interest that was primarily before us in *McCready*: that of the tenants. In this case, unlike in *McCready*, it is not necessarily a government agent directly entering the tenants' homes. Instead, the city of Pasco merely requires the landlord to provide certification that the housing offered to the public meets minimum housing standards and allows certain nonstate agent professionals to provide that certification. PMC 5.78.020. Instead of authorizing state agents to enter the property themselves, the ordinance utilizes the landlord's authority under the State's Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, to enter the tenant's home. PMC 5.78.020. Importantly, that act does not create a

blanket right of entry, and it does provide a mechanism to protect the privacy interests of the tenant. The act requires that the tenant be given at least two days' written notice of the landlord's intent to enter the tenant's home and authorizes entry only at reasonable times. RCW 59.18.150(5).[1] "The landlord has no other right of access except by court order, arbitrator or by consent of the tenant," with exceptions not relevant to us. RCW 59.18.150(6). Thus, any inspection of an occupied unit performed pursuant to the ordinance should be done with the tenant's consent or by court order or arbitrator; anything less runs the risk of violating RCW 59.18.150 and article I, section 7 of our state constitution.

I caution, however, that if and when inspections go beyond reasonable inspections for housing code violations, the complexion of this controversy will change. *Cf. State v. Ludvik,* 40 Wn. App. 257, 262-63, 698 P.2d 1064 (1985). If inspectors function like the eyes and ears of the State, looking for suspicious activities, they will become government agents. *Id.* ("[O]fficial involvement is not measured by the primary occupation of the person conducting the search, but the capacity in which he acts at the time."). If in fact, if not in job title, these inspectors are state actors, conducting warrantless intrusions into the private affairs of tenants, the protections of article I,

[1] The landlord may enter without notice only in the event of an emergency or if it is impractical to give notice. RCW 59.18.150(5).

section 7 will attach. *See State v. Swenson,* 104 Wn. App. 744, 754-56, 9 P.3d 933 (2000) (state action when the government "*knew of* and *acquiesced in* the intrusive conduct" and the private citizen "intended to assist law enforcement efforts." (emphasis added) (quoting *State v. Clark,* 48 Wn. App. 850, 856, 743 P.2d 822 (1987))).

Because that is not the case before us and because I agree with the majority that the challengers have failed to demonstrate a facial or as applied violation of the state constitution, I respectfully concur.

/s/ Chambers, J.
Alexander, C.J.

SANDERS, J. (dissenting) – The majority holds the City of Pasco may require landlords to search tenant apartments absent tenant consent notwithstanding our constitution's protection against unauthorized invasions of privacy. The linchpin of the majority's argument is that under these facts there is no state action. I disagree. Even though the ordinance allows landlords the option to utilize private inspectors approved by the city, private inspectors under the ordinance are simply doing the work of city inspectors. This is state action which invades the tenant's home without the "authority of law" provided by a warrant. WASH. CONST. art. I, § 7. These warrantless

residential searches therefore violate our state constitution.

Article I, section 7 of our constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." On July 7, 1997, Pasco City Council enacted Ordinance 3231 to require residential landlords to certify their units meet certain health, safety, and building code requirements. But before a landowner can obtain certification, his residential units must be physically searched by either a city enforcement officer or a private inspector approved by the city. Pasco Municipal Code (PMC) 5.78.020(C).[1] Consent of the tenant to a search of his own residential unit is not required by the ordinance.

The majority claims because a landlord may resort to private inspectors, there is no state action. Majority at 10. But "official involvement is not measured by the primary occupation of the person conducting the search, but the capacity in which he acts at the time." *State v. Ludvik,* 40 Wn. App. 257, 262-63, 698 P.2d 1064 (1985). To determine if there is state action we ask: (1) whether Pasco knew of and acquiesced to the intrusion and (2) whether the inspector intended to assist law enforcement. *See* majority at

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[1] Pasco also allows either a Washington licensed structural engineer or architect to inspect the unit. PMC 5.78.020(C). Nonetheless they are still government licensed and also doing the work of a government inspector.

10.[2] Here the answer to both questions is a clear yes: Pasco requires an inspector who is employed or approved by the city to search a tenant's residence to assess (and thereby help enforce) health, safety, and building codes. And if a landlord does not force the warrantless search over tenant objections, he loses his business license.

There is state action if Pasco either "'instigated, encouraged, counseled, directed, or controlled'" private conduct. *State v. Wolken,* 103 Wn.2d 823, 830, 700 P.2d 319 (1985) (quoting *State v. Mannhalt,* 33 Wn. App. 696, 702, 658 P.2d 15 (1983)). Similarly, the Ninth Circuit has said there is state action under the Fourth Amendment even if the government is involved only "indirectly as an encourager of the private citizen's actions." *United States v. Walther,* 652 F.2d 788, 791 (9th Cir. 1981); *see also United States v. Reed,* 15 F.3d 928, 931-33 (9th Cir. 1994). Pasco instigates and encourages these searches, dictates their scope, and examines their fruits. The housing code inspection not only occurs at Pasco's demand, but the ordinance also rigidly lays out

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[2] The same test is used under the Fourth Amendment to determine whether a private individual is a state actor. "[The] two critical factors in the 'instrument or agent' analysis are: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *United States v. Miller,* 688 F.2d 652, 657 (9th Cir. 1982) (quoting *United States v. Walther,* 652 F.2d 788, 791-92 (9th Cir. 1981)).

who can perform the inspections and the specific scope of the inspection. *See* PMC 5.78.020(C). Furthermore, the ordinance requires a landlord to select an inspector that is either directly employed or specifically approved by the city. *Id.* Given such extensive government involvement, the physical search need not be done by an actual city employee to trigger constitutional protections. The nonconsensual search of residential rental units invades tenants' private affairs without either the tenant's consent or a warrant fulfilling our constitutional requirement of "authority of law." *City of Seattle v. McCready,* 124 Wn.2d 300, 304, 877 P.2d 686 (1994) ("[W]ithout the tenant's consent, a warrant [is] necessary to authorize an inspection of rented premises."); *see also Camara v. Municipal Court,* 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding administrative searches conducted by municipal building inspectors are significant intrusions on individual's Fourth Amendment interests, and such searches must be conducted with a warrant); *Chapman v. United States,* 365 U.S. 610, 616-17, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) ("[T]o uphold [an entry based only on a landlord's consent], search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" (last three alterations in original) (quoting *Johnson v. United States,* 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948))). Here there is no warrant or

other authority of law to authorize the inspector's intrusion.

The majority claims, however, private inspectors are merely furthering the "*private* objective of obtaining a certification needed to maintain a business license." Majority at 10. The business license requirement is imposed by the government. Moreover landlords are coerced into complying with these unwanted intrusions into private residential units to further the government's objective of compliance with health and safety codes. The landlords are not "first and foremost furthering their *own* ends when they engage in the inspections contemplated by the ordinance," *id.*, but are actually furthering the city's ends. *See also* majority at 12 ("[E]ntry into a rental unit necessary to obtain a certificate required to renew a business license is a private action that is intended to benefit the landlord."). The inspector's reports are necessarily delivered to the city, and the city retains full authority to punitively enforce any perceived code violation.

Moreover, potentially if evidence is seen in plain view indicating a criminal violation by the tenant, this could also be used to support issuance of a criminal search warrant and subsequent prosecution of the tenant. Obviously this is state action. Pasco caused the inspector's intrusion, and the inspector assists law enforcement by disclosing the fruits of the physical search of the tenant's home to the government. But absent a warrant or consent, these inspections

clearly are without that "authority of law" mandated by our state constitution.

I dissent.

/s/ Sanders, J.
J M Johnson, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF PASCO, Respondent, v. BERNARD N. SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Appellants.	No. 22884-3-III Division Three Panel One PUBLISHED OPINION (Filed May 5, 2005)
COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUELA VALA, MARIA GALEANA, Defendants.	

BROWN, J. – Today we review the constitutionality of City of Pasco Ordinance 3231, requiring residential landlords to obtain a business license conditioned upon presenting an inspection certificate showing compliance with health and safety standards. The City successfully enforced its ordinance by summary judgments against appellant landlords, Bernard and Jean Shaw; intervenor tenants, Robert Lee and Billie Jean Gaines, Manuela Vala, and Maria Galeana; and intervenor landlord-manager

corporation, Columbia Basin Apartment Association. We hold the ordinance is consistent with state and federal constitutional search and privacy principles, and is not unconstitutionally vague. Accordingly, we affirm the trial court's grant of summary judgment to the City and the summary dismissal of appellants' claims.

FACTS

In July 1997, acting on health and safety risks of tenants residing in potentially dangerous, substandard conditions, the City passed Ordinance 3231 regulating dwelling rental licenses. Effective January 1, 1998, the ordinance conditions residential landlord business licenses upon obtaining a certificate of inspection showing all dwelling units meet the City's Uniform Housing Code "and do not present conditions that endanger or impair the health or safety of a tenant[.]" PMC 5.78.020(a); Clerk's Papers (CP) at 296. Nine inclusive health and safety conditions are listed. The first eight conditions deal with structural strength, weather exposure, plumbing and sanitation, water, heating, electrical, exit, and fire risks. And the ninth condition concerns "violations of other applicable codes, rules, or regulations." PMC 5.78.020(a)(9); CP at 297.

The applicant receives "a provisional business license pending the timely submission of its initial certificate of inspection." PMC 5.78.020(b); CP at 297. Applicants must submit a certificate of inspection

based upon physical inspections "not more than 90 days prior to the date of the certificate" by "(1) a City of Pasco Code Enforcement Officer, (2) the U.S. Department of Housing and Urban Development, (3) certified private inspectors approved by the City, (4) a Washington licensed structural engineer"; or "(5) a Washington licensed architect." PMC 5.78.020(c); CP at 297.

The Gaineses denied inspection (their landlords, Robert and Joan Lawrence, are not parties in this appeal). Mr. Vala and Ms. Galeana, the Shaws' tenants, also refused inspection of their individual dwelling unit, part of a multiplex. Three of the Shaws' buildings with four dwellings each failed inspection. Therefore, the City refused to renew the Shaws' provisional business license for 1999. In January 1999, the City sued for an injunction barring the Shaws from engaging in the rental business without a valid business license. In response, the Shaws pleaded Ordinance 3231 violated the state and federal constitutions. The Association and the tenants later intervened and counter-sued.

In February 1999, the appellants and the Lawrences filed a federal district court suit against the City for declaratory and injunctive relief under 42 U.S.C. § 1983. They alleged the City applied the ordinance unconstitutionally: (1) in requiring unreasonable searches and seizures; (2) because the ordinance is vague, thereby depriving plaintiffs of due process guaranteed by the Fourteenth Amendment to the U.S. Constitution; and (3) in requiring fee

payments constituting illegal taxes (no longer an issue). The parties agreed to stay the state proceeding pending resolution of the federal suit.

In October 1999, the City successfully moved for summary judgment in the federal suit. The district court ruled the ordinance did not implicate the Fourth Amendment because the landlords, able to conduct private inspections, were not state actors. The Ninth Circuit vacated and remanded, holding the district court should have abstained from ruling on the matter until after the state action. *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 807 (9th Cir. 2001).

Returning to state court, the parties filed cross-motions for summary judgment. The City first prevailed on the constitutional issues, then, in June 2003, the City received a stipulated summary judgment on the sole remaining issue, whether the Shaws should be enjoined from conducting their rental business because they lacked a business license. The parties consented to stay enforcement on agreed conditions until appeal of the constitutional issues. The Supreme Court transferred the appeal to this court.

ANALYSIS

A. Search and Privacy Contentions

The issue is whether the trial court erred in concluding Ordinance 3231 did not violate search or

privacy principles established in the Fourth Amendment of the United States Constitution or article I, section 7 of the Washington Constitution and granting summary judgment dismissal of those claims.

We review constitutional issues de novo. *Shoop v. Kittitas County,* 149 Wn.2d 29, 33, 65 P.3d 1194 (2003). The Shaws contend Ordinance 3231 violates the state and federal constitutions because it authorizes an illegal search of the tenants' dwellings. Amicus Institute for Justice focuses its arguments solely within the privacy and home evasion context within the Washington Constitution.

The Fourth Amendment to the United States Constitution partly provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. For a search to fall within the proscription of the Fourth Amendment, the person "invoking its protection must claim state invasion of a justifiable, reasonable, or a legitimate expectation of privacy." *State v. Crandall,* 39 Wn. App. 849, 852, 697 P.2d 250 (1985).

Article I, section 7 privacy protections "are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment." *City of Seattle v. McCready,* 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (*McCready* I) (citing *State v. Gunwall,* 106 Wn.2d 54, 65, 720 P.2d 808 (1986)). Both constitutions require some form of state action to invoke their

protections. *Burdeau v. McDowell,* 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921); *State v. Ludvik,* 40 Wn. App. 257, 262, 698 P.2d 1064 (1985); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed.1996). Even so, action by law enforcement is not necessary to invoke the protections of article I, section 7. *See State v. Vonhof,* 51 Wn. App. 33, 37, 751 P.2d 1221 (1988) (tax appraiser action implicates article I, section 7); *Camara v. Municipal Court,* 387 U.S. 523, 530-32, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (warrant required for administrative inspections).

Since the City's ordinance requires a landlord to provide a certificate of inspection and does not authorize the City to search for code violations, the Shaws must prove governmental action by showing the landlord is a state actor. They fail because their authority concerns actions by a city building inspector and school officials, government employees acting within the scope of their employment. *See McCready* I, 123 Wn.2d at 265 (city building inspector); *Kuehn v. Renton Sch. Dist. No. 403,* 103 Wn.2d 594, 602, 694 P.2d 1078 (1985) (school officials).

The Shaws incorrectly argue being required to hire a private inspector to inspect their rentals is like hiring a City agent to look for code violations. But to transform a private person into a state actor, the state must know of, and acquiesce in, an illegal private search, and the private party performing the search must do so to further a governmental rather than a private purpose. *State v. Swenson,* 104

Wn. App. 744, 754, 9 P.3d 933 (2000), *review denied*, 148 Wn.2d 1009 (2003).

A landlord has a private, albeit statutory, right to inspect the leased premises in order to discharge legal duties. *See* RCW 59.18.150(1) ("The tenant shall not unreasonably withhold consent to the landlord to enter a dwelling unit in order to inspect the premises."); RCW 59.18.060(1) (landlord has duty to maintain premises in compliance with all applicable codes, regulations, ordinances, and statutes). While landlords commonly retain contractual inspection rights, we deem the parties' contract relies on existing law. *Caritas Servs., Inc. v. Dep't of Social & Health Servs.*, 123 Wn.2d 391, 405, 869 P.2d 28 (1994). In any event, the landlords' preexisting private inspection right is consonant with the ordinance's regulatory goals. The landlords allude to the increased cost of doing business and a property value threat, but this is not a takings case. The City's policy makers resolved the benefit and burden dilemma cast in the ordinance after public discourse, a legislative function not properly before us for judicial review.

Regarding the tenants' inspection refusal, the Residential Landlord-Tenant Act of 1973 (RLTA), gives the landlord premise inspection rights with at least two days notice that the tenant cannot unreasonably refuse. RCW 59.18.150(1). Upon unreasonable refusal, the tenant may be liable for up to $100 a day and can be assessed costs and attorney fees. RCW 59.18.150(5). While certainly another burden for the

Shaws, they have the legal means to gain entry under RCW 59.18.150.

Turning to the tenants' privacy rights, as noted, under the RLTA tenants cannot unreasonably deny inspection access to landlords. While the tenants may possess a subjective expectation of privacy, the legislative policy reflected in the RLTA provides for such an intrusion. Thus, residential tenants logically hold no reasonable expectation of privacy in refusing the inspection. *See McCready* I, 123 Wn.2d at 270 ("The assessment of whether a cognizable privacy interest exists under Const. art. 1, § 7 is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold."). Therefore, when proper notice is given for entry by a landlord, a tenant has no reasonable expectation of privacy other than that entry for inspection will occur. *Kalmas v. Wagner,* 133 Wn.2d 210, 220, 943 P.2d 1369 (1997).

In sum, we hold the landlords acting directly or through their privately engaged inspectors are not state actors. And, the tenants' privacy rights are not offended.

B. Due Process Contentions

The next issue is whether the trial court erred in concluding Ordinance 3231 was not vague in violation of the due process clause of the Fourteen [sic]

Amendment and granting summary judgment dismissal of that claim. Review remains de novo.

For landlords to receive a business license, the ordinance requires a certificate of inspection showing all dwelling units comply with the Uniform Housing Code (UHC) and no conditions exist endangering or impairing tenant health or safety, including:

> (1) structural members that are insufficient in size or strength to carry imposed loads with safety;
>
> (2) exposure of the occupants to the weather;
>
> (3) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury;
>
> (4) lack of water, including hot water;
>
> (5) heating or ventilation systems that are not functional or are hazardous;
>
> (6) defective, hazardous, or missing electrical wiring or electrical service;
>
> (7) defective or inadequate exits that increase the risk of injury to occupants;
>
> (8) violations that increase the risks of fire; or
>
> (9) *violations of other applicable codes, rules, or regulations.*

PMC 5.78.020(a); CP at 50 (emphasis added). The Shaws challenge solely condition nine, arguing the

language is vague by giving the inspector broad discretion to choose and arbitrarily apply unspecified inspection standards.

Duly adopted ordinances are presumed constitutional. *City of Seattle v. Eze,* 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The party urging unconstitutional vagueness has the heavy burden of proving vagueness beyond a reasonable doubt. *Id.* An ordinance is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Haley v. Med. Disciplinary Bd.,* 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (quoting *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). But, the "vagueness test does not require a statute to meet impossible standards of specificity." *Anderson v. City of Issaquah,* 70 Wn. App. 64, 75, 851 P.2d 744 (1993). It is sufficient if the statute provides adequate notice of prohibited conduct and prevents arbitrary, discretionary enforcement. *Haley,* 117 Wn.2d at 739-40.

Here, the challenged language is not so vague that it cannot be understood by an ordinary person. As part of an inclusive list of sample conditions endangering or impairing tenant health or safety, an inspector is guided in condition nine to look solely for conditions violating "applicable" codes, rules or regulations. PMC 5.78.020(a); CP at 50. Arbitrary, discretionary application is curbed by the standards set in such materials. For example, electrical violations referred to in condition six are normally controlled by a specific electrical code. Moreover, landlords, like

other citizens, are presumed to know the law. *Maynard Inv. Co. v. McCann,* 77 Wn.2d 616, 624, 465 P.2d 657 (1970).

Because the vagueness challenge here does not raise First Amendment rights, our review is on an "as applied" basis, thus, we focus on the facts. *Maynard v. Cartwright,* 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); *State v. Lee,* 135 Wn.2d 369, 393, 957 P.2d 741 (1998). Appalling dwelling conditions are well supported by the record. For instance, the affidavit of Richard Ryan Mumma, Jr., Mr. Shaws' private inspector, noted conditions in dwelling units he inspected including mildew, improper venting, lack of heating (with specific UHC reference), exterior walls incapable of keeping out the weather, multiple plumbing deficiencies, insect infestation, broken sheet rock and unsound wall finishes, warped and buckling walls. For "Other Violations" Mr. Mumma listed water leaking into a hole behind a shower, a bucket used to catch water due to a missing sink trap, a failed ground fault circuit interrupter, and leaking kitchen plumbing. CP at 388. Based on his findings, Mr. Mumma "deemed substandard" the units he inspected under the UHC and PMC 5.78.020 and gave seven specific sub-section references to UHC 1001-2. CP at 392. Thus, fears of arbitrary inspection are unsubstantiated by the facts.

Given our analysis, we hold Ordinance 3231 is not unconstitutionally vague.

Affirmed.

/s/ Brown, J
Brown, J.

WE CONCUR:

/s/ Kato CJ
Kato, C.J.

/s/ Sweeney, J.
Sweeney, J.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, vs. BERNARD N. SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof. Defendants, COLUMBIA BASIN APARTMENT ASSOCIATION Intervenors.	NO. 99-2-50036-1 **STIPULATED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING ISSUANCE OF PERMANENT INJUNCTION; AND GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS AND THIRD-PARTY COMPLAINT OF DEFENDANTS BERNARD N. SHAW AND B. JEAN SHAW, INTERVENING DEFENDANTS COLUMBIA BASIN APARTMENT ASSOCIATION AND INTERVENING DEFENDANT TENANTS** (Filed Jun. 30, 2003)

THIS MATTER having regularly come before the above-entitled Court upon the Plaintiff's Motion for Summary Judgment for the final remaining issue

in this case, to-wit: issuance of a Permanent Injunction, based upon the agreement and stipulation reached between the parties, and the Court having jurisdiction over the subject matter and the parties hereto, and having reviewed the pleadings, affidavits and declarations and other documents filed herein, and being informed of the stipulation of the parties, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1) It is hereby ordered, adjudged and decreed that the Defendant Bernard N. Shaw and B. Jean Shaw, husband and wife, their employees, servants and agents acting on their behalf, are hereby permanently enjoined and restrained from operating and conducting within the City limits of the City of Pasco, Washington, any business of renting or making available for rent to the public residential dwelling units as defined by Pasco Municipal Code 5.04.160(a) without having first secured a residential rental business license as required by Pasco Municipal Code 5.78.010, including fulfilling the requirements for the inspection as provided in Pasco Municipal Code 5.78.020.

2) This permanent injunction shall take effect forty-five (45) days from the date of the entry of this Order to afford the Defendants sufficient opportunity to comply with the requirement of the Pasco Municipal Code Sections as provided above and to secure their residential rental business license. In the event

an appeal is taken, this permanent injunction may be stayed until 45 days after the final determination of such appeal subject to the Defendants:

a) secure a provisional business license;

b) payment of all business license fees; and

c) Defendants shall maintain the premises subject to such license in a safe and habitable condition as required by the Pasco Municipal Code 5.78.020 without securing the required inspections.

3) That the affirmative defenses, counterclaims and third-party complaints of the Defendants Bernard N. Shaw and B. Jean Shaw; the intervening Defendants, Columbia Basin Apartment Association; and intervening Defendant Tenants, Robert Lee Gaines and Billie Jean Gaines, Manual Vala and Maria Galeana, as previously addressed by prior Summary Judgment Order dated October 28, 2002, shall be and hereby are dismissed.

4) That pursuant to RAP 2.2 (13), this is a final Order affecting the rights of the parties for the purpose of appeal.

DONE IN OPEN COURT this 30th day of June, 2003.

/s/ Robert G. Swisher
Judge/Court Commissioner

Presented By:	Approved as to Form Notice of Presentment Waived:
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER, LLP	**COWAN WALKER, P.S.**
/s/ Leland B. Kerr	/s/ Lucinda J. Luke
Leland B. Kerr, WSBA No. 6059	Lucinda J. Luke, WSBA No. 26783
Attorneys for Plaintiff City of Pasco	Attorneys for Defendants/ Intervenors Bernard N. Shaw, B. Jean Shaw and Columbia Basin Apartment Association

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, vs. BERNARD N. SHAW and B. JEAN SHAW, husband and wife and the martial community composed thereof, Defendants, COLUMBIA BASIN APARTMENT ASSOCIATION Intervenors.	NO. 99-2-50036-1 **SUMMARY JUDGMENT**

I. JUDGMENT SUMMARY

Judgment Creditor:	City of Pasco, Washington
Judgment Debtor:	Bernard N. Shaw and B. Jean Shaw; Columbia Basin Apartment Association; and Defendant Tenants, Robert Lee Gaines and Billie Jean Gaines, Manual Vala and Maria Galeana
Principal Judgment Amount:	N/A

Interest of Date of Judgment:	N/A
Interest Rate After Judgment:	N/A
Attorney's Fees:	N/A
Costs:	N/A
Other Recovery Amounts:	N/A
Attorney for Judgment Creditor:	Leland B. Kerr of Paine, Hamblen, Coffin, Brooke & Miller, LLP
Attorney for Judgment Debtor:	Lucinda Luke of Cowan Walker, P.S.

II. HEARING

2.1 *Date*. June 30, 2003 by Stipulation.

2.2 *Appearances*. Plaintiff appeared by counsel, Leland B. Kerr of Paine, Hamblen, Coffin, Brooke & Miller, LLP, and Defendants appeared by counsel, Lucinda J. Luke of Cowan Walker, P.S.

2.3 *Summary Judgment*. The purpose of the hearing was to determine the final remaining issue in this case, to-wit: the issuance of a permanent injunction enjoining the Defendants from conducting a residential rental business within the City limits of the City of Pasco, Washington, without a business license and required inspection. All other issues identified in the Plaintiff's claim or within the Defendants' or Intervening Defendants' affirmative

defenses, counterclaims and third-party complaints have been previously determined by summary judgment. This Order is entered by stipulation for the purpose of preparing a final judgment in this case.

2.4 *Evidence.* This Motion is based upon the files and records as identified in the Affidavit of Leland B. Kerr in Support of the Plaintiff's Motion for Summary Judgment and Injunctive Relief.

III. FINDINGS

The Court having considered the evidence and the agreement of counsel, finds:

3.1 *No Issue.* There is no genuine issue as to any material fact in this case.

3.2 *Judgment.* The Plaintiff is entitled to judgment as a matter of law.

IV. SUMMARY JUDGMENT

On the basis of the foregoing findings, it is hereby ORDERED, ADJUDGED AND DECREED that:

4.1 The Plaintiff's Motion for Summary Judgment and Injunctive Relief is granted.

4.2 The Defendant Bernard N. Shaw and B. Jean Shaw, husband and wife, their employees, servants and agents acting on their behalf, are hereby permanently enjoined and restrained from

operating and conducting within the City limits of the City of Pasco, Washington, any business of renting or making available for rent to the public residential dwelling units as defined by Pasco Municipal Code 5.04.160(a) without having first secured a residential rental business license as required by Pasco Municipal Code 5.78.010, including fulfilling the requirements for the inspection as provided in Pasco Municipal Code 5.78.020.

4.3 The permanent injunction is issued 45 days from the date of the entry of this Order to afford the Defendants sufficient opportunity to comply with the requirement of the Pasco Municipal Code Sections as provided above and to secure their residential rental business license. In the event an appeal is taken, this permanent injunction may be stayed until 45 days after the final determination of such appeal subject to the Defendants:

a) secure a provisional business license;

b) payment of all business license fees; and

c) Defendants shall maintain the premises subject to such license in a safe and habitable condition as required by the Pasco Municipal Code 5.78.020 without securing the required inspections.

4.4 That the affirmative defenses and counterclaims of the Defendants Bernard N. Shaw and B. Jean Shaw; the intervening Defendants, Columbia Basin Apartment Association; and intervening Defendant Tenants, Robert Lee Gaines and Billie Jean

Gaines, Manual Vala and Maria Galeana, as previously addressed by prior Summary Judgment Order dated October 28, 2002, shall be and hereby are dismissed.

4.5 That pursuant to RAP 2.2(13) this is a final Order affecting the rights of the parties for the purpose of appeal.

DONE IN OPEN COURT this 30 day of June,

/s/ Robert G. Swisher
Judge/Court Commissioner

Presented By:
PAINE, HAMBLEN, COFFIN, BROOKE & MILLER, LLP

/s/ Leland B. Kerr
Leland B. Kerr,
WSBA No. 6059
Attorneys for Plaintiff
City of Pasco

Approved as to Form
Notice of Presentment
Waived:
COWAN WALKER, P.S.

/s/ Lucinda J. Luke
Lucinda J. Luke,
WSBA No. 26783
Attorneys for Defendants/
Intervenors Bernard N.
Shaw, B. Jean Shaw
and Columbia Basin
Apartment Association

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Defendants. COLUMBIA BASIN APARTMENT OWNERS ASSOCIATION, Intervenors.	NO. 99-2-50036-1 ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (CONSTITUTIONAL ISSUES) (Filed Oct. 28, 2002)

THIS MATTER having regularly come before the above-entitled Court for argument of the party's cross motions for partial summary judgment on the 9th day of September, 2002, and the Court having reviewed the pleadings, affidavits, declarations and other documents filed herein, and having heard argument of counsel, **NOW THEREFORE**,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

RCW 59.18.150 allows landlords to inspect rented property, so long as it is done in a reasonable manner, the landlord does not abuse the right or use

it to harass the tenant, and normally upon two days' notice. The *Kalmas,* case holds that this limited right to invade the privacy of a tenant in the residence is not an unreasonable search, if done for limited purposes.

Regarding the issue of whether the ordinance forces landlords to become state actors, this Court is persuaded by the analysis of Judge Whaley – "if landlords act in their self-interest, they will inspect their property for their own economic benefit." They have a statutory right to do so, in many cases have a contractual right to do so, and have an obligation to do so when requested to by a tenant under conditions where habitability is affected.

Plaintiff City of Pasco's Motion for Partial Summary Judgment is granted. Defendants'/Intervenors' Motion for Partial Summary Judgment is denied.

DONE IN OPEN COURT this 28 of October, 2002.

/s/ Vic L. Vanderschoor
HONORABLE VIC L. VANDERSCHOOR

Presented by:

COWAN WALKER, P.S.

By: /s/ Lucinda J. Luke
Lucinda J. Luke, WSBA #26783
Attorney for Defendants Shaw and
Columbia Basin Apartment Association

Approved by:

PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER, LLP

By: _____
Leland B. Kerr, WSBA No. #6059
Attorney for Plaintiff City of Pasco

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Defendants	)	NO. 99-2-50036-1 ORDER ALLOWING TENANTS TO INTERVENE AS PARTY DEFENDANTS AND THIRD PARTY PLAINTIFFS

THIS MATTER coming regularly before the Court on the Motion of the Robert Lee Gaines and Billie Jean S. Gaines, Manuel Vala and Maria Galeana (the "Tenants") by and through their attorneys of record, Thomas A. Cowan and Lucinda J. Luke of Cowan Walker, P.S., and the Court being fully informed in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED that, based upon the Order dismissing Defendants Shaw and remanding with instructions the matter of ***Columbia Basin Apartment Association v. City of Pasco***, United States District Court for the Eastern District of Washington Cause No. CT-99-5013-RHW, dated October 22, 2001, a copy of which in [sic] on file herein, the Tenants shall intervene as party defendants to plead defenses set out in the answer they will file in this matter and to also intervene as third

party plaintiff against the City of Pasco to plead all remaining common claims asserted in their Complaint filed in the United States District Court for the Eastern District of Washington Cause No. CT-99-5013-RHW, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A." The Tenants do not duplicate those claims already asserted by the Shaws but realleges them as third party plaintiffs.

DONE IN OPEN COURT this 11th day of March, 2002.

/s/ Robert G. Swisher
JUDGE

Presented by:

COWAN WALKER, P.S.

By: /s/ Lucinda J. Luke
Lucinda J. Luke,
WSBA #26783
Attorney for Defendants/
Third Party Plaintiffs

Approved by:

PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER, LLP

By: /s/ Leland B. Kerr
Leland B. Kerr,
WSBA No. #6059
Attorney for Plaintiff
City of Pasco

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Defendants	NO. 99-2-50036-1 STIPULATED ORDER ALLOWING COLUMBIA BASIN APARTMENT ASSOCIATION TO INTERVENE AS PARTY DEFENDANT AND THIRD PARTY PLAINTIFF

IT IS HEREBY STIPULATED AND AGREED between the above-named Plaintiff, City of Pasco, by and through its attorneys of record, LELAND B. KERR of Paine, Hamblen, Coffin, Brooke & Miller, LLP, Defendants Shaw and intervening party Columbia Basin Apartment Association, by and through their attorneys of record, THOMAS COWAN and LUCINDA LUKE of Cowan Walker, P.S., based upon the Order dismissing Defendants Shaw and remanding with instructions the matter of ***Columbia Basin Apartment Association v. City of Pasco***, United States District Court for the Eastern District of Washington Cause No. CT-99-5013-RHW, dated October 22, 2001, a copy of which in [sic] on file herein, Columbia Basin Apartment Association shall intervene as a party Defendant to plead defenses set out in the answer it will file in this matter and to also

intervene as a Third Party Plaintiff against the City of Pasco to plead all [remaining common /s/ LJL] claims asserted in its Complaint filed in the United States District Court for the Eastern District of Washington Cause No. CT-99-5013-RHW, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A." It is understood and agreed between the parties that the Association does not duplicate those claims already asserted by the Shaws but realleges them as a Third Party Plaintiff.

DONE IN OPEN COURT this 14 day of January, 2002.

/s/ Carolyn A. Brown
JUDGE

Presented by:

COWAN WALKER, P.S.

By: /s/ Lucinda J. Luke
Lucinda J. Luke, WSBA #26783
Attorney for Defendants/Shaw and Columbia Basin Apartment Association

Approved by:

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER, LLP

By: /s/ Leland B. Kerr
Leland B. Kerr, WSBA No. #6059
Attorney for Plaintiff City of Pasco

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA BASIN APARTMENT ASSOCIATION; BERNARD SHAW; JEAN SHAW; ROBERT LAWRENCE; JOAN LAWRENCE; ROBERT LEE GAINES; BILLIE JEAN S. GAINES; MANUEL VALA; MARIA GALEANA,

Plaintiffs-Appellants,

v.

CITY OF PASCO,

Defendant-Appellee.

No. 00-35041

D.C. No. CV-99-05013-RHW

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 12, 2001 – Seattle, Washington

Filed September 26, 2001

Before: Arthur L. Alarcon, Ferdinand F. Fernandez, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Alarcon;
Dissent by Judge Tashima

COUNSEL

John J. McDermott, Jackson & Campbell, P.C., Washington, D.C., for the plaintiffs-appellants.

Leland B. Kerr (argued) and David D. Hilton, Evans, Kerr Haney & Hilton, P.S., Kennewick, WA, for the defendant-appellee.

OPINION

ALARCON, Circuit Judge:

Appellants appeal from the order granting summary judgment on the merits in favor of the City of Pasco. For the reasons stated below, we apply the *Younger* abstention doctrine to dismiss Bernard and Jean Shaw from this action, and apply the *Pullman* doctrine to vacate and remand the claims of the remaining Appellants with instructions to stay further proceedings until the Washington state courts have had the opportunity to consider the merits of the issues raised in the complaint under that state's law.

I

BACKGROUND

Appellants Bernard and Jean Shaw ("Shaws") and Robert and Joan Lawrence ("Lawrences") are landlords in the City of Pasco ("City"). The Shaws rent an apartment to Robert Lee Gaines and Billie Jean Gaines ("Gaineses"). The Lawrences rent an apartment to Manuel Vala ("Vala") and Maria Galeana ("Galeana"). The Columbia Basin Apartment Association ("CBAA") is a nonprofit organization

consisting of individuals and corporations that own and manage rental housing in the City.[1]

On July 7, 1997, the City enacted Ordinance 3231 ("Pasco Ordinance") to ameliorate sub-standard and dangerous rental dwelling units in the City. The Pasco Ordinance specifies in pertinent part that:

> Any person renting or making available for rent to the public any dwelling unit shall secure a license registering each dwelling unit including a certification warranting that each such dwelling unit complies with the Uniform Housing Code as adopted by the City and does not present conditions that endanger or impair the health or safety of the tenants. . . . Issuance of the business license shall be contingent upon submission of the certification, inspection, as required by this title, payment of the fee provided above and compliance with Chapter 5.78 of this title.

PMC 4.04.160(a). Chapter 5.78 of the Pasco Ordinance, in turn, prohibits renting "to the public any residential dwelling unit . . . without securing and maintaining a current business license as required by this title." PMC 5.78.010. In addition, the Pasco Ordinance states in pertinent part that "[a]s a condition for the issuance of a license provided by this

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[1] For ease of reference, we herein refer to the collective group of appellants as "Appellants" except when it is necessary to distinguish among them.

chapter, the applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant." PMC 5.78.020(a). The Pasco Ordinance further provides that "[t]he applicant shall submit a certificate of inspection based upon the physical inspection of the dwelling units conducted not more than 90 days prior to the date of the certificate of inspection and compliance certified by" one of the following: (1) a City of Pasco Code Enforcement Officer; (2) the U.S. Department of Housing and Urban Development; (3) certified private inspectors approved by the City; (4) a Washington licensed structural engineer; or (5) a Washington licensed architect. PMC 5.78.020(c).

Finally, PMC 5.78.030 establishes civil penalties for violations of the Pasco Ordinance. Specifically, it states that "[a]ny person violating any of the provisions or failing to comply with any of the requirements of this chapter, shall upon a finding that the act or omission had been committed, be punishable by a fine of not more than $500 dollars and shall be guiltily [sic] of a code infraction. Each such person is guilty of a separate code infraction for each and every day during any portion of which any violation of any provision . . . is committed. . . ." PMC 5.78.030(a). "In addition to the penalties provided above, any violation of this chapter may result in the revocation of the business licenses provided by this title. Any violation of this chapter . . . may . . . result in the issuance of a

notice of civil violation . . . subject to the penalties as imposed under the provisions of this code." PMC 5.78.030(c).[2]

The Gaineses have refused to consent to an inspection of their apartment. Consequently, their landlords, the Shaws, have refused to allow the City inspector to have access to the Gaineses' apartment. Vala and Galeana have also refused to consent to an inspection of their apartment. As a result, the Lawrences have refused to allow an enforcement officer to inspect Vala and Galeana's apartment. The Lawrences and the Shaws have notified the City that they are unable to comply with the Pasco Ordinance because their tenants object to the inspections.

In response, the City has repeatedly informed the Shaws that failure to comply with the Pasco Ordinance may result in (1) civil penalties; (2) imprisonment;[3] (3) revocation of their business license; (4) closure of the building; and (5) eviction of the tenants. On January 26, 1999, the City filed a civil action

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[2] The Pasco Ordinance also establishes criminal penalties: "Any person who knowingly submits or assists in the submission of a falsified certificate of inspection . . . shall, in addition to the penalties provided in the subsection(a) above be guilty of a gross misdemeanor and shall be punished by a fine of not more than $5,000 dollars or by imprisonment for each separate offense . . . " 5.78.030(b). This subsection is not implicated in this case.

[3] The City concedes on appeal that none of the Appellants in this case is subject to criminal penalties under the Pasco Ordinance and that this aspect of the correspondence between the parties was in error.

against the Shaws in Franklin County Superior Court, requesting, inter alia, an injunction to: (1) restrain the Shaws from conducting the business of residential rentals in the City without a valid business license; and (2) enforce their compliance with the Pasco Ordinance. The City has threatened the Lawrences with taking action to enforce its civil remedies against them for failing to comply with the Pasco Ordinance, but has not yet taken any enforcement measures.

On January 26, 1999, Appellants filed the present action in federal district court seeking declaratory and injunctive relief under 42 U.S.C. § 1983. The complaint alleges that:

> [T]he City's application of the Ordinance is constitutionally invalid because it: (i) violates the constitutional protection from unreasonable searches and seizures set forth in the Fourth Amendment to the Constitution of the United States; (ii) is constitutionally vague, thereby depriving Plaintiffs of due process guaranteed by the Fourteenth Amendment to the U.S. Constitution; and (iii) mandates the payment of 'fees' which constitute an illegal tax.

The record reflects that at some point during the pendency of the federal suit, the City and the Shaws jointly agreed to stay the state proceeding pending resolution of the Appellants' action in federal court.

On October 6, 1999, the City moved for summary judgment in this matter. The district court granted

the motion. It ruled that the Pasco Ordinance does not implicate the Fourth Amendment because it permits landlords to conduct private inspections. The district court also determined that the Pasco Ordinance does not require landlords to act as state actors in inspecting the tenants' residences. We have jurisdiction over this timely appeal under 28 U.S.C. § 1291.

II

STANDING

Because the group of Appellants is comprised of landlords, tenants, and an organization, three groups with distinct interests, we first consider their standing to maintain this action. "Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court." *Juidice v. Vail,* 430 U.S. 327, 331 (1977). "Standing is a question of law reviewed de novo." *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 706 (9th Cir. 1997) (quoting *Snake River Farmers' Ass'n v. Dep't of Labor,* 9 F.3d 792, 795 (9th Cir. 1993) and reviewing standing sua sponte).

Three elements are required to establish Article III standing:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and

> particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1176 (9th Cir. 2000) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

We conclude that all of the Appellants have standing in this case. The tenants assert that enforcement of the Pasco Ordinance in the face of their exercise of their Fourth Amendment right to be free from unreasonable searches is likely to result in their eviction. The tenants maintain that unless they consent to an allegedly unreasonable search, the City will deprive their landlords of business licenses and the buildings will be condemned. Eviction is a concrete injury. *See Yesler Terrace Cmty. Council v. Cisneros,* 37 F.3d 442, 446-47 (9th Cir. 1994) (holding threat of eviction is concrete, real threat to interests of residents sufficient to comprise injury in fact). This injury is sufficiently imminent because the City has sued the Shaws and notified the Lawrences that it intends to enforce the Pasco Ordinance against them. *See Darring v. Kincheloe,* 783 F.2d 874, 877 (9th Cir. 1985) ("A threatened injury may be justiciable."); *cf.*

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298-99 (1979) ("When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court."); *Younger v. Harris,* 401 U.S. 37, 42 (1971) (same). The tenants' injuries are fairly traceable to the challenged action of the City – the enforcement of the Ordinance. And finally, it is likely that these injuries will be redressed by a declaration that the Pasco Ordinance is unconstitutional. Thus, the tenants have standing.

The landlords allege in the complaint that enforcement of the Pasco Ordinance will violate their Fourteenth Amendment due process rights.[4] The landlords contend that the Pasco Ordinance compels them to either violate the Fourth Amendment rights of their tenants by insisting on inspection, or lose

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[4] The complaint reads in pertinent part:

> 22. The individual Plaintiffs have not consented, nor will they consent, to the warrantless entry by government officials onto their property.
>
> 23. In the face of this exercise of constitutional rights, the City's decision to terminate or, in the alternative, not issue business licenses will deprive owners and residents of due process.

Counsel for the landlords reiterated this argument in oral argument before this court in response to a question regarding the landlords' standing.

their business licenses.[5] This allegation is sufficient to demonstrate an injury in fact. We have held that "[a] person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex." *Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 707 (9th Cir. 1997). If the Pasco Ordinance requires the landlords to invade the Fourth Amendment rights of their tenants in order to obtain their business licenses, this is no less of an injury than requiring a person to discriminate on the basis of race or gender in order to obtain a governmental benefit. *See Harris v. United States,* 331 U.S. 145, 150 (1947) ("This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizens."), *overruled on other grounds by Chimel v. California,* 395 U.S. 752 (1969). Thus, the City's enforcement of the Pasco Ordinance may impermissibly threaten the landlords with a

---

[5] From the record before us, it is somewhat unclear whether the City has issued the Shaws and the Lawrences business licenses in the past and has threatened revocation or nonrenewal of those licenses due to their noncompliance with the Pasco Ordinance, or whether the City has simply refused to issue licenses to the Shaws and the Lawrences. At least one piece of correspondence in the record suggests that the City has threatened revocation of existing licenses. In either event, the Shaws and the Lawrences face the threat of a concrete injury.

deprivation of property and civil penalties if they are unwilling to violate the Fourth Amendment rights of their tenants. *See Groten v. California,* 251 F.3d 844, 850-51 (9th Cir. 2001) (statute establishing standards for business license may create property interest protected by the Due Process Clause); *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing."). In addition, the enforcement of the Pasco Ordinance exposes the landlords to the risk of litigation. *Cf. Wilson,* 125 F.3d at 708 (holding that the person "required to discriminate also suffers injury in fact because the statute exposes him to risk of liability for the discrimination").

The threat of these injuries is sufficiently imminent. The landlords' injuries are fairly traceable to the challenged action of the City – the enforcement of the Ordinance. And finally, it is likely that these injuries will be redressed by a declaration that the Pasco Ordinance is unconstitutional. Thus, the landlords have standing.

The record does not show whether CBAA has suffered, or been threatened with, an injury as an organization *qua* organization. However, an organization may have standing to assert the claims of its members even where it has suffered no direct injury from a challenged activity. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 341 (1977). An organization has standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the

organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity,* 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting *Hunt,* 432 U.S. at 343).

The first prong of the *Hunt* test for organizational standing is satisfied for the reasons stated above. As landlords resident in Pasco, CBAA's membership faces a threat of injury whenever a tenant refuses to permit inspection. The second prong of *Hunt* is also satisfied because the interest of CBAA in insuring that its members do not lose their renter's licenses for violating the Pasco Ordinance is clearly germane to CBAA's purpose of benefitting Pasco landlords.

In order to meet the third prong of the *Hunt* test, the CBAA's "claims proffered and relief requested [must] not demand individualized proof on the part of its members." *Id.* at 1408. Appellants request only injunctive and declaratory relief. Because these forms of relief do not require individualized proof, the third prong of the *Hunt* test is satisfied. *Id.*; *see Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle,* 829 F.2d 933, 938 (9th Cir. 1987) ("[b]ecause the [organization] seeks declaratory and prospective relief rather than money damages, its members need not participate directly in the litigation."). CBAA has constitutional standing to sue.

III

YOUNGER ABSTENTION

As noted above, the City filed a civil action against the Shaws in the Superior Court of Franklin County, Washington, requesting an injunction to compel the Shaws to comply with the Pasco Ordinance. Pursuant to a joint request of the parties, the state court stayed that proceeding pending resolution of this federal action. The existence of a pending state court proceeding filed by the City presents the question whether the district court should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971).

In *Younger*, the Supreme Court "'espouse[d] a strong federal policy against federal-court interference with pending state judicial proceedings.'" *H.C. v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)). The *Younger* principle applies to civil proceedings, such as these, in which important state interests are involved. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986). "'Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims.' When the case is one in which the *Younger* doctrine applies, the case must be dismissed." *Koppel*, 203 F.3d at 613 (citations omitted). As a threshold condition to the above three requirements, "*Younger* applies only

when the relief the plaintiff seeks in federal court would 'interfere' with the ongoing state judicial proceeding." *Green v. City of Tucson,* No. 99-15625, 2001 WL 760750, *10 255 F.3d 1086 (9th Cir. Jul. 9, 2001) (en banc).

The *Younger* doctrine may be raised sua sponte at any time in the appellate process. *Koppel,* 203 F.3d at 613. Nevertheless, we are not required to raise *Younger* sua sponte because the doctrine does not implicate our subject matter jurisdiction. *Dayton Christian Schs.,* 477 U.S. at 626 (stating that *Younger* abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced."); *see also Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm.,* 891 F.2d 719, 725 (9th Cir. 1989) (stating that an appellate court is not required to raise *Younger* sua sponte). As the Supreme Court has explained:

> Younger and [its progeny] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal. It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977); *see also Dayton Christian Schs.,* 477 U.S. at 626 ("A state may . . . voluntarily submit to federal jurisdiction even though it might have had a tenable claim for [*Younger*] abstention.").

Thus, the Supreme Court has held that a state may waive its right to raise *Younger* abstention on appeal where "the State expressly urge[s] . . . the District Court to proceed to an adjudication of the constitutional merits." *Dayton Christian Schs.,* 477 U.S. at 626. Here, the record does not reflect that the City "expressly urge[d]" the district court to adjudicate the constitutional merits of this case. *Id.* On the contrary, the City filed its claims in state court. The Appellants filed this matter in a federal forum. *See Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391, 394 (9th Cir. 1995) (holding state waived *Younger* abstention by expressly urging district court to adjudicate merits); *Boardman v. Estelle,* 957 F.2d 1523, 1535 (9th Cir. 1992) (per curiam) (stating in dictum that "[a] state may waive *Younger* only by express statement, not through failure to raise the issue"); *see also Kendall-Jackson Winery, Ltd. v. Branson,* 212 F.3d 995, 997 (7th Cir. 2000) (suggesting that, under *Younger,* "[p]erhaps federal judges have the power to disregard a forfeiture (as opposed to a waiver), just as they have discretion to overlook a state's failure to assert the exhaustion requirement in a collateral attack on a criminal judgment."); *cf. United States v. Perez,* 116 F.3d 840, 845 (9th Cir. 1997) (explaining in context of

invited error doctrine that "[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right.'"). Therefore, we apply the *Younger* analysis to the Shaws' claims and conclude that all of the requirements are met.

As an initial matter, the threshold condition for application of *Younger* is present in this case. In the state proceeding, the City requests, inter alia, a permanent injunction to restrain the Shaws from conducting the business of residential rentals in Pasco without a valid business license, a determination that the Shaws are guilty of an infraction for each day of conducting business within Pasco without a license, and judgments against the Shaws in the amount of $500.00 per day. In this proceeding, the Shaws do more than simply "challeng[e] the constitutionality of a state statute." *Green,* 2001 WL 760750 at *11. They request that a federal court, inter alia, (1) declare that the license fees imposed by the Pasco Ordinance are illegal; (2) restrain the City from enforcing or collecting the fees imposed by the Pasco Ordinance; and (3) restrain the City from revoking their business licence [sic] for failure to comply with the Pasco Ordinance. Thus, the relief the Shaws seek in federal court would interfere with the ongoing state judicial proceeding. *Cf. Green,* 2001 WL 760750 at *10 (holding no interference where "the federal court action did not seek to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceeding."); *Fresh Int'l*

Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1360 n. 8 (9th Cir. 1986) ("*Younger* abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court."); *Confederated Salish v. Simonich*, 29 F.3d 1398, 1405 (9th Cir. 1994) (holding that the district court did not err in refusing to abstain under *Younger* where the federal plaintiff, who was also the state-court plaintiff did not seek to "restrain [] state proceedings or invalidat[e] a state law.").

We now turn to the three criteria for application of *Younger* abstention. The first criterion is satisfied because the City's state court suit against the Shaws was pending at the time this suit was filed. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) (holding stayed state court proceeding is "ongoing" under *Younger*); *Wiener v. County of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) ("To decide whether there was a pending state judicial proceeding within *Younger*, we focus on the status of the state court proceeding at the time of the district court's decision rather than on its *current* status on appeal."); *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987) ("[T]he critical question is not whether the state proceedings are still 'ongoing,' but whether 'the state proceedings were underway before initiation of the federal proceedings.'"). *But cf. Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106-07 (9th Cir. 1988) (holding no "ongoing" state proceeding where remanded state proceeding was stayed during second federal appeal and City had not

raised abstention in district court, nor in two appeals to the Ninth Circuit, nor in appeal to the Supreme Court).

The second criterion is met because the City has a strong interest in its land-use ordinance and in maintaining habitable dwellings for its residents. *Cf. San Remo Hotel,* 145 F.3d at 1104 (holding municipality has strong interest in land-use ordinance and in providing uniform procedures for resolving zoning disputes); *Mission Oaks Mobile Home Park v. City of Hollister,* 989 F.2d 359, 361 (9th Cir. 1993) (rent control), *overruled on other grounds by Green,* 2001 WL 760750. As discussed in further detail below, Washington has also expressed a particularly strong interest in the privacy of its citizens by affording more protection to its citizens than the federal Constitution. *See e.g., State v. Simpson,* 622 P.2d 1199, 1205 (Wash. 1980) (en banc) (noting that, unlike the federal Constitution, Washington "clearly recognizes an individual's right to privacy with no express limitations"). Finally, the third criterion is satisfied because the Shaws have an opportunity to pursue their federal claims in the ongoing state proceeding. We therefore dismiss the Shaws' claims under *Younger.*

IV

PULLMAN ABSTENTION

We next consider whether the claims of the remaining Appellants warrant abstention under *R.R.*

Comm'n v. Pullman Co., 312 U.S. 496 (1941). The *Pullman* abstention doctrine "is a narrow exception to the district court's duty to decide cases properly before it. *Pullman* allows postponement of the exercise of federal jurisdiction when 'a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984). Specifically, *Pullman* holds that "federal courts should abstain from decisions when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts . . . avoid both unnecessary adjudication of federal questions and 'needless friction with state policies. . . .'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citation omitted). If we abstain "under *Pullman*, retention of jurisdiction, and not dismissal of the action, is the proper course." *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979).

While we may sua sponte consider *Pullman* abstention at any time, *San Remo Hotel*, 145 F.3d at 1105, we are never *required* to apply *Pullman* because, like *Younger* abstention, the doctrine does not implicate our subject matter jurisdiction. *Hydrostorage, Inc.*, 891 F.2d at 725. Unlike *Younger*, however, the concerns underlying the *Pullman* doctrine are not necessarily diminished when the state has consented to federal jurisdiction. In *Ohio Bureau of Employment*

Services v. Hodory, the Supreme Court declined to apply *Younger* because the state had voluntarily chosen to submit to a federal forum. 431 U.S. at 480. The Supreme Court nevertheless considered application of the *Pullman* doctrine, reasoning that, "Pullman abstention, where deference to the state process may result in elimination or material alteration of the constitutional issue, surely does not require that this Court defer to the wishes of the parties concerning adjudication." *Id.* at 480 n. 11; *see also San Remo Hotel,* 145 F.3d at 1104 ("Nor do we refuse to consider *Pullman* abstention because it was not raised before the district court."); *Kendall-Jackson Winery,* 212 F.3d at 997 (noting that *Hodory* implies that an appellate court retains the *power* to consider abstention despite the state's "waiver"); *Inter'l College of Surgeons v. City of Chicago,* 153 F.3d 356, 360-61 & n. 4 (7th Cir. 1998) (holding that failure of a party to raise *Pullman* doctrine in district court will not necessarily operate as a waiver, while noting that a state may waive an abstention argument based on *Younger*). As set forth below, we conclude that *Pullman* abstention is appropriate in this case.

This court utilizes three criteria for the application of the *Pullman* doctrine. First, the case must touch on a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open. Second, it must be plain that the constitutional adjudication can be avoided if a definite ruling on the state issue would terminate the controversy. Finally, the possible determinative

issue of state law must be uncertain. *Confederated Salish,* 29 F.3d at 1407.

In this case, all three criteria are met. First, "[w]e often have held that land-use planning questions 'touch a sensitive area of social policy' into which the federal courts should not lightly intrude." *Pearl Inv. Co. v. City & County of San Francisco,* 774 F.2d 1460, 1463 (9th Cir. 1985); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1095 (9th Cir. 1976) (holding land use planning is sensitive area of social policy).

The second criterion for abstention is met because interpretation of the validity of the Pasco Ordinance under the Washington Constitution may eliminate the need to determine whether it also violates the federal Constitution. In addition, under the third criterion, the validity of the Pasco Ordinance under the Washington Constitution is uncertain. To describe the Washington constitutional issue adequately, we must set forth a brief summary of the current state of administrative search law in Washington. This begins with the federal constitutional standard set forth in *Camara v. Mun. Court of the City & County of San Francisco,* 387 U.S. 523 (1967).

In *Camara* the Court held that state actors require a warrant supported by probable cause in order to perform nonconsensual administrative searches in compliance with the Fourth Amendment. *Id.* at 533, 538. The Court determined that, while the standards for probable cause "will vary with the

municipal program being enforced, [they] may be based on the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.* at 538. In so doing, the Court explicitly lowered the probable cause test from the standard applied in criminal cases, reasoning that "[t]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 538-39.

The Washington Supreme Court rejected *Camara* in two en banc opinions. First, in *City of Seattle v. McCready,* 868 P.2d 134 (Wash. 1994) (en banc) ("*McCready I*"), building owners appealed from the grant of the city of Seattle's warrant applications, which permitted city officials to inspect their buildings for housing code violations on less than probable cause. On appeal, the building owners argued that the search warrants violated Wash. Const. art. I, § 7. Specifically, they urged the court to reject the Fourth Amendment standards for administrative inspection established in *Camara. Id.* at 138. The Washington Supreme Court declined to address that argument, finding that "such a ruling [was] unnecessary to the resolution" of the case. *Id.* Instead, the court addressed the question "whether the Superior Court

had the authority to issue the[] search warrants." *Id.* at 140.

The court determined that "the solution to this case is found in the unique characteristics of Const. art. 1, § 7, particularly its language, and pre-existing state case and statutory law." *Id.* at 138. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. This language is significantly different from that present in its federal counterpart, the Fourth Amendment to the United States Constitution. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV.

The Washington Supreme Court has made it emphatically clear that "Const. art. I, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than those provided by the Fourth Amendment." *McCready,* 868 P.2d at 137-38; *see also State v. Stroud,* 720 P.2d 436, 439 (Wash. 1986) (en banc) (Wash. Const. art. I, § 7 "affords individuals greater protections against warrantless searches than does the Fourth Amendment."); *State v. Simpson,* 622 P.2d 1199, 1205 (Wash. 1980) (en banc) ("Const. art. 1, § 7

differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations."); *State v. White,* 958 P.2d 982, 985 (Wash. 1998) ("We have often diverged from the United States Supreme Court's Fourth Amendment jurisdiction, and we have more narrowly defined the exceptions to the search warrant requirements."). *But cf. In re Meyer,* 16 P.3d 563, 568-69 (Wash. 2001) (en banc) (stating that Wash. Const. art. I, § 7 "provides no more protection than the federal constitution in the context of the interest in confidentiality, or the nondisclosure of personal information.").[6]

The *McCready I* court concluded that the broader protection of the Washington Constitution dictates that "Const. art. 1, § 7 prohibits courts from issuing warrants without an authorizing statute or court rule." 868 P.2d at 141. The court then reviewed RCW 19.27.031, which incorporates several uniform

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[6] The Washington Supreme Court has determined that "[t]he relevant inquiry under the Washington [C]onstitution in determining whether there has been a search is 'whether the State has unreasonably intruded into a person's "private affairs."'" *State v. Young,* 867 P.2d 593, 597 (Wash. 1994) (en banc) (citation omitted). "The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry. Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. However, under the Washington [C]onstitution the inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Id.* (citations omitted).

housing codes, to determine if any of them provides legislative authority for the issuance of a warrant to enforce Seattle's inspection ordinance. *Id.* at 143. "Each of these codes grants inspectors a 'right of entry' for enforcement purposes." *Id.* Seattle contended that the "right of entry" indicated a legislative intent to authorize superior courts to issue warrants in support of enforcement activities. *Id.* The court rejected Seattle's argument, holding that "a right of entry, and even an authorization to seek a warrant to implement a right of entry, is not equivalent to a legislative authorization for a court to issue a warrant *on less than probable cause.*" *Id.* (emphasis added). In so holding, the court noted that:

> Even if the code itself provided for a warrant, this does not itself imply that a statute is categorically sufficient to provide the authority of law necessary to satisfy Const. art. 1, § 7. . . . In this case, we examine the uniform codes because, prior to examining whether a particular statute may satisfy Const. art. 1, § 7, it is necessary to determine whether an applicable statute exists. Since we conclude that there is no such statute, we do not consider whether a specific authorizing statute would otherwise pass constitutional muster.

Id. at 144 n. 11.

Subsequently, in *McCready II*, the Washington Supreme Court decided "the question *McCready I* did not explicitly reach, namely whether a municipal court possesses the authority to issue an administrative

search warrant *supported by probable cause.*" *City of Seattle v. McCready,* 877 P.2d 686, 688 (Wash. 1994) (en banc) ("*McCready II*"). The court held that "[o]f the statutes and court rules cited by the City, none authorizes the issuance of administrative inspection warrants supported by probable cause to believe a civil infraction, rather than a crime, has occurred." *Id.* at 691. Specifically, the court reviewed RCW 10.79.015 and several court rules and concluded that "[u]nder these rules, the municipal court has authority to issue administrative search warrants supported by probable cause only if the application for the inspection warrant alleges a housing code violation which constitutes a *crime* rather than a civil infraction." *Id.* at 692.

In this case, the parties agree that in order to comply with the Fourth Amendment standard enunciated in *Camara,* state officials must obtain warrants to inspect the apartments of nonconsenting tenants. The Washington Supreme Court's decisions in *McCready I* and *McCready II* make clear that the Washington Constitution requires a Washington statute, court rule, or judicial opinion authorizing the issuance of such warrants. If no such authority exists, it is impossible for inspectors to comply with the Washington Constitution in circumstances where the tenants refuse to consent to the inspection.

The City cites three Washington statutes as possibly providing such authorization when read in concert. First, RCW § 59.18.150 grants landlords a

right of entry in certain circumstances. The statute provides in pertinent part:

> (1) The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services. . . . (4) The landlord has no other right of access except by court order, arbitrator or by consent of the tenant. (5) A landlord or tenant who continues to violate this section after being served with one written notification alleging in good faith violations of this section . . . shall be liable for up to one hundred dollars for each violation after receipt of the notice.

RCW 59.18.150. In addition, the City cites to two provisions of the Washington's Landlord-Tenant Act, RCW 59.18.060 and RCW 59.18.115. RCW 59.18.060 requires that landlords maintain the habitability of their buildings. It provides in pertinent part:

> The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular: (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant.

RCW 59.18.060. RCW 59.18.115 provides tenants a means to enforce 59.18.060. It provides:

> (2)(a) If a landlord fails to fulfill any substantial obligation imposed by RCW 59.18.060 that substantially endangers or impairs the health or safety of a tenant . . . the tenant shall give notice in writing to the landlord . . . (b) If after receipt of the notice described in (a) . . . the landlord fails to remedy the condition . . . the tenant may request that the local government provide for an inspection of the premises . . .

RCW 59.18.115.

The City contends that together with the Pasco Ordinance, these three statutes comprise "reasonable legislative or administrative standards for conducting inspections." Specifically, the City maintains that an "order of entry" issued pursuant to RCW 59.18.159 is the functional equivalent of an administrative search warrant. Appellants agree that an order of entry is equivalent to a search warrant but contend that "[t]here is simply no basis to conclude that a Washington [c]ourt could issue a RCW 59.18.150 'entry order' after *McCready* was decided." Alternatively, Appellants suggest that we certify this question to the Washington Supreme Court. The district court correctly observed that in order to issue an inspection warrant, Washington courts "must find their authority in a statute or court rule." Although the court stated that "[n]o statute quite fits," the court speculated that "[i]t could be argued that an entry order

issued pursuant to RCW 59.18.150 is the functional equivalent of a warrant." While the Washington Supreme Court may ultimately agree with this proposition, existing Washington law does not clearly dictate this result.

No Washington court has evaluated the constitutionality of Pasco Ordinance No. 3231 under Art. 1, § 7.[7] Thus, no Washington court has determined whether the Washington Landlord-Tenant Act, the "right of entry" statute, RCW 59.18.150, or any other statute for that matter, provides the requisite authorization for Washington courts to issue administrative warrants to enforce the Pasco Ordinance. The parties have cited no Washington authority discussing whether an order of entry under 59.18.150 is the functional equivalent of a warrant or whether an order of entry is permissible in light of *McCready I* and *McCready II*. These are novel and uncertain questions of state law in light of the substantial differences between the Fourth Amendment and Art. 1, § 7 set forth in *McCready I* and *McCready II*. Abstention is therefore appropriate. *Cf. Reetz v.*

[7] The district court noted that "[i]t seems striking that the parties have not cited (and the Court's own research has not located) a single decision from any jurisdiction, published or unpublished, addressing Pasco's licensing system. This is probably explainable by *McCready*. If a jurisdiction has a procedure in place for issuing administrative warrants for civil violations, that jurisdiction, can remain true to the letter, as well as the spirit, of *Camara*. Washington may stand alone in this regard."

Bozanich, 397 U.S. 82, 86 (1970) (abstaining under *Pullman* where provisions of Alaska Constitution had never been interpreted by Alaska court).

Because the Pasco Ordinance implicates a state constitutional provision that differs significantly from the Fourth Amendment, *Pullman* abstention is particularly appropriate. *Midkiff,* 467 U.S. at 237 n. 4 ("The Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions."); *Midkiff v. Tom,* 702 F.2d 788, 799-800 (9th Cir. 1983) (Poole, J., concurring) ("*Pullman* abstention may also be appropriate where a state court may find that the challenged statute violates the state's own constitution. But such abstention is limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution."), *rev'd on other grounds,* 467 U.S. 229 (1984); *Pue v. Sillas,* 632 F.2d 74, 80 (9th Cir. 1980) ("The Court reaffirmed the distinction . . . between state constitutional provisions which are integrally related to the challenged state statutory scheme and those which simply mirror the federal constitution in *Examining Board of Eng'rs Architects & Surveyors v. Flores de Otero,* [426 U.S. 572, 598 (1976)]."); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A Fed. Prac. & Proc. Juris. 2d § 4242 (1988) ("The proper line appears to be that abstention is in order if the case may turn on the interpretation of some specialized state constitutional provision, but not if the state provision is

substantially similar to the federal provision that is the basis of the federal challenge.").

V

CONCLUSION

Because the relief sought by the Appellants regarding the validity of the Pasco Ordinance may be available under Washington law, we conclude that the district court should not have decided the merits of the federal constitutional claims presented in this complaint. The order granting summary judgment in favor of the City is VACATED. We REMAND this matter of the district court with instructions to dismiss the claims filed by the Shaws, and to stay all further proceedings until the state courts of Washington have finally determined any proceedings filed by the parties regarding the validity of the Pasco Ordinance.

VACATED AND REMANDED.

TASHIMA, Circuit Judge, dissenting:

Because I cannot agree with either the majority's resolution of the jurisdictional issue or its decision to order abstention, I respectfully dissent. In my view, none of the appellants has established Article III standing, and the majority's resolution of the abstention issue is squarely at odds with recent, controlling, en banc authority.

I.

With respect to standing, there are three classes of plaintiffs-appellants. I address the standing of each, in turn.

The majority grants Article III standing to the landlord-plaintiffs on the basis of the statement in *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 707 (9th Cir. 1997), that "[a] person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex." *See* maj. op. at 13786 (quoting *Monterey Mech.*). But the reason we found injury in that case is missing in this case. We there concluded that requiring a person to discriminate on the basis of ethnicity or sex caused injury because "Americans view ethnic or sex discrimination as 'odious.'" *Monterey Mech.,* 125 F.3d at 707 (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 214 (1995)). Such discrimination is "wrong." *Id.* But there is nothing "odious" or morally "wrong" about a landlord reserving in a lease the right of reasonable inspection of the leased premises. In fact, such provisions are commonly included in both commercial and residential leases. Thus, *Monterey Mech.* will not bear the weight that the majority seeks to place on it.

Because the landlord-plaintiffs have not suffered a cognizable "injury," they lack Article III standing.

As the majority recognizes, the standing of the Columbia Basin Apartment Association ("CBAA") depends on the standing of its members. *See* maj. op.

at 13787. The CBAA, however, fails to meet the first requirement of *Hunt,* that in order for any organization to have standing, "its members [must] otherwise have standing to sue in their own right. . . ." *Hunt v. Wash. State Apple Advertising Comm'n,* 432 U.S. 333, 341 (1977). As the discussion above demonstrates, landlords, who are the association's members, lack standing to sue in their own right. I thus conclude that the CBAA also lacks standing.

The tenant-plaintiffs claim that enforcement of the Pasco Ordinance will result in a non-consensual, government-compelled search of their apartments, in violation of their Fourth Amendment rights. The Ordinance, however, provides for no such remedy, *i.e.,* a compelled search. It does not provide for the issuance of an injunction compelling a landlord to make an inspection and obtain a Certificate. It simply provides that a business license will not issue without a Certificate. The only enforcement provision in the Ordinance is a civil penalty against a *landlord* who rents without a license. Nothing in the Ordinance provides for any enforcement remedy directly against a tenant.

Presumably, a landlord can reserve in a lease his right of reasonable inspection of the premises. If he does, and the record is silent on this point, his right of inspection arises under the lease and not under the Ordinance. If he does not, he presumably would be in breach of the lease for any inspection made without a right to do so, and the tenant's remedy is against the

landlord for breach of the lease's provision of quiet enjoyment and not against the City of Pasco.

Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442 (9th Cir. 1994), and the other cases relied on by the majority in support of standing for the tenants, are not on point. Those cases hold only that a threat of injury can be sufficient to meet the actual injury requirement for standing, a proposition with which I have no quarrel. The majority does not fairly address, however, the required causal connection between the Ordinance and any injury to the tenants. Its only "analysis" of this point consists of the single, conclusory sentence: "The tenants' injuries are fairly traceable to the challenged action of the City – the enforcement of the Ordinance." Maj. op. at 13785.

Although the Ordinance may be a cause in fact why a landlord would elect to exercise his right of reasonable inspection of the premises, it is not the Ordinance that gives him the legal right to do so. I do not understand either the landlord-plaintiffs or the tenant-plaintiffs to contend otherwise. To repeat, the Ordinance, does not purport to give a landlord any inspection rights, vis a vis his tenants. Such rights, if any there are, must flow from the lease, which governs the relationship between landlord and tenant, or provisions of state law other than the Ordinance. Thus, because any injury to the tenants will require the independent, intervening action of the landlords, exercising their legal rights under the lease or other provisions of state law, it cannot be said that the tenants' claimed injury is "fairly traceable to the

challenged" ordinance for Article III standing purposes.[1] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

I conclude, therefore, that the tenant-plaintiffs as well lack Article III standing.

II.

Assuming, however, that plaintiffs do not lack standing, the majority errs in its analysis of whether we should decline to reach the merits of this dispute under *Younger*[2] and *Pullman*[3] abstention.

Based on the fact that the Shaws are defendants in a state court civil action brought by the City of Pasco, the majority holds that *Younger* abstention applies. While paying lip service to *Green v. City of Tucson,* 255 F.3d 1086 (9th Cir. 2001) (en banc), which held that "[a]s a threshold condition to the above three [*Younger* abstention] requirements, '*Younger* applies only when the relief the plaintiff seeks in federal court would "interfere" with the ongoing state judicial proceeding,'" maj. op. at 13788 (quoting *Green,* 255 F.3d at 1098), the majority nonetheless

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[1] A landlord's inspection of the leased premises also would not constitute a Fourth Amendment search because no state action would be involved

[2] *Younger v. Harris,* 401 U.S. 37 (1971).

[3] *R.R. Comm'n v. Pullman Co.,* 312 U.S. 496 (1941).

proceeds to invoke *Younger* abstention even though no such "interference" is present in this case.

The majority tries vainly to trump up the "interference" by this case with the state court case:

> In this proceeding, the Shaws do more than simply "challeng[e] the constitutionality of a state statute." *Green,* 255 F.3d at 1098. They request that a federal court, inter alia, (1) declare that the license fees imposed by the Pasco Ordinance are illegal; (2) restrain the City from enforcing or collecting the fees imposed by the Pasco Ordinance; and (3) restrain the City from revoking their business license for failure to comply with the Pasco Ordinance. Thus, the relief the Shaws seek in federal court would interfere with the ongoing state judicial proceeding.

Maj. op. at 13790-91. Of course, this is nothing more than an embellished restatement that the plaintiffs are challenging the constitutionality of the Pasco Ordinance – how else can one challenge the constitutionality of an ordinance, except by seeking to have it declared unconstitutional and to enjoin it? This action does not threaten a direct interference with ongoing state court proceedings; this is not what *Green* meant by "interference."

First, quoting the Court in *New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans,* 491 U.S. 350 (1989) ("*NOPSI*"), we recognized in *Green* that "the federal court's disposition of such a case may well affect, or for practical purposes preempt, a

future – or, as in the present circumstances, *even a pending* – state court action. But there is no doctrine that the availability or *even the pendency* of state judicial proceedings excludes the federal courts." *Green,* 255 F.3d at 1096 (quoting *NOPSI,* 491 U.S. at 373) (emphasis in the original). We then stated that "[i]n short, as the Court has often repeated, the 'mere potential for conflict in the results of adjudications,' is not the kind of 'interference' that merits federal court abstention." *Id.* (quoting *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 816 & 818 (1976)). We next noted that "[s]ince the possibility of duplicative litigation is a price of federalism, the prospect of such duplication, without more, does not constitute interference with state court proceedings justifying a federal court's dismissal of a case properly within its jurisdiction." *Id.* at 1098. Finally, we indicated what would constitute "interference" – a federal court action that "seek[s] to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings." *Id.*

Here, even as expansively restated by the majority, this federal litigation is, at most, parallel to and possibly duplicative of the state court litigation. It most emphatically does not constitute the kind of *direct interference* with the state court proceeding required by *Green* in order to invoke *Younger* abstention. I therefore disagree that *Younger* requires that we dismiss the Shaws' claims. On the contrary, *Green* requires that we do not.

It also bears on the case at bench that, in *Green*, we held that *Younger* abstention could not be invoked against plaintiffs in the federal action who were not parties in the pending state court action. *Id.* at 1099-1103. Here, none of the plaintiffs, except the Shaws, are parties to the state court proceeding; thus, *Younger* abstention is unavailable, as against them. The majority therefore proceeds to invoke *Pullman* abstention against the remaining plaintiffs. This invocation of *Pullman* abstention, however, is premised on the validity of *Younger* abstention against the Shaws. For if the Shaws are permitted to pursue their claims against the City of Pasco, as they should be under *Younger* and *Green*, none of the benefits to be achieved by *Pullman* abstention against the remaining plaintiffs will materialize. *Pullman* abstention is an equitable doctrine to be invoked at the court's discretion. *See San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). Because, as I have explained above, the Shaws should be permitted to remain in federal court actively to litigate their claims, equity and discretion counsel against invoking *Pullman* abstention as against the remaining plaintiffs.

In the circumstances of this case, the better course of action would be to accept the plaintiffs' suggestion to certify the doubtful questions of state law to the Washington Supreme Court, rather than to order *Pullman* abstention.

III.

Because all of the plaintiffs lack Article III standing, I would remand the case with directions to dismiss the action. Were I to reach the merits of the dispute, I would order neither *Younger* nor *Pullman* abstention, but would certify the unresolved questions of state law to the Washington Supreme Court. For these reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA BASIN APARTMENT ASSOCIATION, et al., Plaintiffs, v. CITY OF PASCO, Defendant.	NO. CT 99-5013-RHW **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 9, 1999)

Before the Court is Defendant's Motion for Summary Judgment. Argument was heard on November 30, 1999. John J. McDermott argued for Plaintiffs; David D. Hilton and Leland B. Kerr for Defendants. This will memorialize the Court's ruling.

BACKGROUND

Plaintiffs moved early on for a preliminary injunction, which the Court denied. **Ct. Rec. 13**. The factual history that gave rise to the case is set out in that order. Because discovery apparently has not yielded any material facts not known at the time the order was entered, there is no need to reiterate its content and, instead, it is incorporated by reference. Suffice it to say that the City of Pasco enacted an ordinance in 1997 requiring a business license for rental properties. The license issues only if a dwelling passes inspection and a fee is paid. The City will provide the services of its building inspector free of

charge, except for the licensing fee. If a tenant or his landlord do not wish a rental unit inspected by a government agent, they are free to use a private sector building inspector approved by the City. **PMC 5.78.020(c)(3)-(5) (Ct. Rec. 3, Exhibit 1)**. The City agrees that a compliance inspection by a government agent is a search within the meaning of the Fourth Amendment. *Conner v. City of Santa Ana*, 897 F.2d 1487, 1490 (9th Cir.1990). The City also agrees that a search requires either a warrant, or consent. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 *et seq.* (1967). The City has not and will not compel an inspection by its own employees. **Ct. Rec. 10, page 3, lines 17-18.** That is because Washington State has adopted a unique rule that renders it virtually impossible to obtain an administrative warrant. *Seattle v. McCready*, 124 Wash. 2d 300, 310 (1994). Instead, landlords unwilling to use City services are financially compelled to arrange for inspections, because they will not be licensed if they do not, and tenants may be judicially compelled to allow inspection pursuant to RCW § 59.18.150. The City reasons that it has removed government sufficiently from the inspection process to eliminate *Camara's* warrant requirement.

The landlord Plaintiffs counter that they are being compelled to perform a traditional governmental function and, as such, are state actors. If they are state actors, then warrants are required.

Discussion

There are two reasons why the Court is reversing its tentative conclusion expressed in the Order Denying Preliminary Injunction. First, an order of entry issued pursuant to RCW § 59.18.150 is the functional equivalent of a warrant. This ruling applies only to the tenant Plaintiffs. Second, while reluctant landlords face a measure of compulsion and are, in a sense, performing a traditional government function, they are not so interwoven with operations of the government as to become state actors. This ruling applies to both the tenant and landlord Plaintiffs.

A. Entry orders as "warrants"

When the City or a state actor acting on behalf of the City invades someone's home to ferret out code violations, it constitutes a search within the meaning of the Fourth Amendment. "It is clear that the warrant requirement of the Fourth Amendment applies to entries onto private land to search for and abate suspected nuisances." *Conner, supra,* 897 F.2d at 1490 (footnote omitted); *accord, Schneider v. County of San Diego*, 28 F.3d 89, 91 (9th Cir. 1994). If the City conducts such a search, it must have either consent or a warrant. *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1222 (ND. Ill. 1998); *Tobin v. City of Peoria,* 939 F. Supp. 628, 630-34 (C.D. Ill. 1996). The law in this regard has been settled for more than 30 years. *Camara, supra*, 387 U.S. at 528 *et seq.* The question is what result if the City does not conduct the search,

but compels the landlord to conduct a search through use of a private building inspector.

Under Washington law, wholesale administrative warrants of the type approved in *Camara* are not allowed. *McCready*, *supra*, 124 Wash. 2d at 310. Absent an authorizing statute or court rule, an inspection warrant may issue only when there is probable cause to believe that a *criminal* violation of the housing code has occurred. *Id.* This is not a constitutionally-based rule, but a matter of statutory construction; *i.e.*, municipal courts do not have inherent authority to issue warrants. *Id.* at 309. Rather, they must find their authority in a statute or court rule. *Id.* No statute quite fits, and the general court rule permitting issuance of warrants is confined to criminal matters. *Id.* at 310. The clear implication is that the legislature could enact a statute allowing administrative warrants for civil infractions, but has not done so. The State Supreme Court could accomplish the same end through court rule, but that has not occurred either.[1]

The legislature has, however, enacted RCW § 59.18.150, which provides:

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[1] It seems striking that the parties have not cited (and the Court's own research has not located) a single decision from any jurisdiction, published or unpublished, addressing Pasco's licensing system. This is probably explainable by *McCready*. If a jurisdiction has a procedure in place for issuing administrative warrants for civil violations, that jurisdiction can remain true to the letter, as well as the spirit, of *Camara*. Washington may stand alone in this regard.

(1) The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants workers, or contractors.

(2) The landlord may enter the dwelling unit without consent of the tenant in case of emergency or abandonment.

(3) The landlord shall not abuse the right of access or use it to harass the tenant. Except in the case of emergency or if it is impracticable to do so, the landlord shall give the tenant at least two days' notice of his or her intent to enter and shall enter only at reasonable times. The tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit at a specified time where the landlord has given at least one day's notice of intent to enter to exhibit the dwelling unit to prospective or actual purchasers or tenants. A landlord shall not unreasonably interfere with a tenant's enjoyment of the rented dwelling unit by excessively exhibiting the dwelling unit.

(4) The landlord has no other right of access except by court order, arbitrator or by consent of the tenant.

(5) A landlord or tenant who continues to violate this section after being served with one written notification alleging in good faith

> violations of this section listing the date and time of the violation shall be liable for up to one hundred dollars for each violation after receipt of the notice. The prevailing party may recover costs of the suit or arbitration under this section, and may also recover reasonable attorneys' fees.

The City contends that entry pursuant to the statute is not a "search." The State Supreme Court has so held.

> [RCW § 59.18.150] gives a landlord a limited right to invade the privacy of a tenant in his or her residence for limited purposes . . . If the scope of the entrance does not exceed these purposes, no unreasonable search occurs. We would agree if the property manager exceeded the limited scope permitted, a cause of action would arise.

Kalmas v. Wagner, 133 Wash. 2d 210, 219-20 (1997).

It could be argued that an entry order issued pursuant to RCW 59.18.150 is the functional equivalent of a warrant. The question is whether "functional equivalent" is good enough to satisfy the Fourth Amendment. *Camara, supra,* rewrote the Fourth Amendment's warrant requirement so far as administrative warrants are concerned. There is no need to show any probability that a specific code defect will be found in a particular residence. 387 U.S. at 534. It is enough that unknown code defects might be found within a block of homes. *Id.* at 537-38. This is an ersatz warrant, totally unlike anything known in

criminal law. Justice White, writing for the majority, conceded that *Camara's* view of what was being passed off as a warrant requirement might be seen by some as a "synthetic search warrant." *Id.* at 538. One court has observed that *Camara* "diluted" the probable cause requirement. *Calabretta v. Floyd*, 189 F.3d 808, 816 (9th Cir. 1999). That is euphemistic. *Camara* gutted it. Under § 59.18.150, the question is reasonableness, not probable cause. As *Camara* defines the term, however, the two inquiries merge.

The touchstone of *Camara* was judicial oversight, not probable cause. The thrust of the decision is that a neutral judicial officer must stand between those whose privacy is sought to be invaded, and those who intend to invade it. 387 U.S. at 532-33. The inquiry is whether society's interest in promoting decent housing outweighs the individual's right to be secure in his home, and the underlying inquiry is whether it is reasonable to look for housing defects where the inspectors intend to look. *Id.* at 536-37. There is a distinction, of course, between a building inspector ferreting out code violations, and a landlord ensuring that his property is not being destroyed, but to the tenant, this is a distinction without a difference. His privacy is no more invaded by the former than it is the latter.

B. State action

For purposes of assessing the merits of the preliminary injunction motion, the Court assumed that a landlord might be a state actor under two

theories: (1) the "public function" test where a private citizen is either allowed or required to a perform a function which traditionally has been vested exclusively in the government; and (2) the "compulsion" test where government coerces private action.[2] *Johnson v. Knowles,* 113 F.3d 1114, 1118-19 (9th Cir. 1997). Now that Defendant has filed a dispositive motion, the assumption must give way to an analysis on the merits.

Absent state action, one private citizen cannot invade the Fourth Amendment rights of another. *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

> At the outset we observe that the fourth amendment protects against unreasonable intrusions by the government, but not against the conduct of private individuals. Thus, evidence discovered in a private search is not subject to exclusion for failure to obtain a search warrant or otherwise comply with the requirements of the fourth amendment.
>
> In defining a private search, the Supreme Court has stated that the fourth amendment applies only if the private party, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state." Application of this definition will frequently require a

[2] The only other tests whereby a private party may become a state actor, "joint action" and "governmental nexus," have no application to these facts.

> careful factual analysis. However, there is little difficulty in holding the fourth amendment applicable to the instant case because prior or contemporaneous governmental involvement in the search was totally absent.

United States v. Sherwin, 539 F.2d 1, 5-6 (9th Cir. 1976) (en banc) (citations omitted).

Governments license. They license a lot. If an activity generates income (and thus a source of taxes), it will be licensed. Vehicles, drivers, physicians, and engineers all are licensed, and the list goes on, and on. Titles 18 and 19 of the Revised Code of Washington take up five volumes of shelf space. And that relates only to businesses and professions. Licensing is so pervasive that the State had to create a business license center to coordinate the plethora of licensing schemes. RCW ch. 19.02. If perchance some commercial, professional, or financial enterprise manages to escape scrutiny at the state level, local governments can be trusted to pick up the slack.

As a condition of gaining and maintaining a license, the licensee must meet certain standards. Sometimes, it is no more than demonstrating the ability to write a check. Sometimes, it is more. Lawyers, for example, must pass the bar and periodically report CLE credits. Most professions have parallel qualifications. The holder of a liquor license must allow liquor control board inspectors access at any time upon demand. Financial institutions are audited without warning. Vehicle owners submit to emissions testing. Sometimes licensing standards and conditions are

merely inconvenient, and sometimes they are onerous. It depends on how much importance society attaches to the activity at issue, how impactive it is on the public health, safety and welfare, and how critical it is to maintain regulatory control over who is allowed to engage in the activity, and how they engage in it.

People say "food and shelter" as though it were one word. That is because shelter is right up there; a basic human need not far behind food. In the dead of winter in these parts, housing might surpass food in value, at least temporarily. Everyone needs safe, pestilence-free housing that keeps the elements at bay. Communities have a significant interest in assuring that such housing is available. It is good for the people living in code-compliant housing, it is good for the value of adjacent properties, and it is good for the health, safety, and economic vitality of the community at large. *Camara*, *supra*, 387 U.S. at 535. For that reason, it is not surprising that a community might wish to license the activity of renting dwellings, and to license only those dwellings that meet minimum standards of habitability.

The fundamental fallacy of Plaintiffs' position is that in conducting an inspection in their private capacity as dwelling owners, landlords are conducting a Fourth Amendment search. No, if landlords act in their self-interest, they will inspect their property for their own economic benefit, and for their own personal assurances that the property is not being damaged, and is being properly maintained. This is something any rational landlord would routinely do.

They have a statutory right to do so under state law. RCW § 59.18.150. They will typically have a contractual right to do so arising out of a lease agreement.[3] They have an obligation to do so when requested to by a tenant under conditions where habitability is affected. RCW § 59.18.070. As private persons, landlords cannot invade their tenants' Fourth Amendment rights by periodically inspecting. *Sherwin*, *supra*, 539 F.2d at 5-6. The City merely wants to reach those landlords who are not acting in their own self-interest. Compelling them to do so does not alter the relationship between landlord and tenant, nor cloak them with the authority of the state.

No tenant need submit to a search. If the tenant is adamant that regardless of advance notice, and regardless of the minimal nature of the intrusion, he absolutely will not allow anyone access, he is free to do that. All he need do is say no, and hand the landlord a notice of termination. Or, the landlord can decide he doesn't need a troublesome tenant, and hand him a notice to quit. Either way there will be some inconvenience to both landlord and tenant as they part ways, but either way, no search will occur while the dwelling is occupied.

No landlord need submit to a search. Lawyers, cab drivers, and butchers are not free to opt out of

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[3] Although, as Plaintiffs accurately note, a contract cannot confer a greater right of entry than does the statute. *See* RCW § 59.18.150(4).

licensing requirements. If they don't like the requirements of their calling, they are free to choose some other calling. So are landlords.

Society attaches great sanctity to the inviolability of the home. That is why even an innocuous code compliance inspection by a government actor must be supported by a warrant. But an inspection by a landlord for the purpose of preserving and protecting his investment is a different creature. Under the ordinance, inspections occur only once every 2 years; far less frequently than a prudent landlord might schedule. A tenant is entitled to at least 2 days advance notice of an inspection. RCW § 59.18.150(3). In the normal course, that should afford ample opportunity to put away items the tenant does not wish exposed to the view of others. A tenant is entitled to force the landlord into court to obtain a writ of entry. RCW § 59.18.150(4). If a landlord abuses the statute, the tenant may recover statutory penalties, costs, and attorney fees. RCW § 59.18.150(5). No rational landlord, or a private inspector working at his behest, could believe his role of inspecting for code violations gives him carte blanche to rummage through drawers, lockers, and other closed containers, and no rational tenant could believe the risk existed. If it did occur, the tenant would have a tort claim independent of the statute. *Kalmas*, *supra*, 133 Wash. 2d at 220.

Finally, no one is looking for evidence of a crime. The ordinance does not create any criminal sanctions

for tenants, and only very limited criminal sanctions for landlords.[4] Of course, a landlord or a private inspector, in their capacity as good citizens, would probably notify the police if they came across a kilo of cocaine being repackaged on the kitchen table. But that doesn't make them state actors. *State v. Walker*, 459 N.W. 2d 527, 531 (Neb. 1990).[5] Neither are they state actors for purposes of this case.

When a private citizen becomes a state actor can be a fact-driven inquiry. *Sherwin*, *supra*, 539 F.2d at 6. It is theoretically possible that a private building

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[4] There is no criminal sanction for maintaining a code violation, although civil penalties may attach. The only criminal exposure a landlord faces is for falsifying a certificate of inspection, or providing false information upon which a certificate issues. **PMC 5.78.030-b (Ct. Rec. 3, Exhibit 1).**

[5] *Walker* is an illustrative case. Joseph Davitt was a police officer who owned rental property. He called a tenant one day and told him they had to meet that afternoon to address landlord/tenant issues. Specifically, the tenant had not paid his full deposit. Davitt also wanted to inspect repair work the tenant was performing in lieu of rent. Davitt appeared at the appointed time and was let in by an occupant of the house. He was then let into the bedroom where the repair work was being done. Lo and behold, there was a set of scales on the floor covered with white powder. Davitt detained the occupants and called his brethren. The obvious question at the ensuing suppression hearing was whether Davitt was a cop or a landlord. A landlord, held the court. He gave the tenant advance notice of entry, the tenant consented, the tenant's agent let him in, and showed him the bedroom. That is exactly how a landlord would have handled the situation. A police officer looking for evidence would not. The fact that Davitt functioned as a police officer after spying the scales was of no moment. The focus is on the role he played at the time of the discovery.

inspector might have "junior G-man" tendencies and use his entry into people's homes as a means of uncovering criminal activity. Anything is possible and, under those facts, particularly if the police were aware of and approved such activity, it would be fair to ask whether the tenant's rights were compromised when his landlord was compelled by the government to allow a state actor to enter his home. But Plaintiffs present a facial challenge[6] and, facially, landlords and private building inspectors are not state actors.

Plaintiffs' other challenges were resolved in the Order Denying Preliminary Injunction.

Accordingly, **IT IS HEREBY ORDERED**:

Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, enter judgment thereon, furnish copies to counsel, and close this file.

DATED this 9 day of December 1999.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

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[6] Plaintiffs deny that their challenge is facial, but saying it doesn't make it so. It is facial.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA BASIN APT. ASSOC., BERNARD & JEAN SHAW, ROBERT & JOAN LAWRENCE, ROBERT LEE GAINES & BILLIE JEAN S. GAINES, MANUEL VALA & MARIA GALEANA Plaintiff(s), vs. CITY OF PASCO Defendant(s),	No. CT-99-5013-RHW **JUDGMENT IN A CIVIL CASE** (Filed Dec. 9, 1999)

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

Defendant's Motion for Summary Judgment is GRANTED. Judgment entered and file is closed.

DATED: December 9, 1999

JAMES R. LARSEN, CLERK

by /s/ Kelly Howard
Kelly Howard, Deputy Clerk

RCW 59.18.060
Landlord – Duties.

The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;

(2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected;

(3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;

(4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single family residence, control infestation during tenancy except where such infestation is caused by the tenant;

(5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;

(6) Provide reasonably adequate locks and furnish keys to the tenant;

(7) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him in reasonably good working order;

(8) Maintain the dwelling unit in reasonably weathertight condition;

(9) Except in the case of a single family residence, provide and maintain appropriate receptacles in common areas for the removal of ashes, rubbish, and garbage, incidental to the occupancy and arrange for the reasonable and regular removal of such waste;

(10) Except where the building is not equipped for the purpose, provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant;

(11)(a) Provide a written notice to all tenants disclosing fire safety and protection information. The landlord or his or her authorized agent must provide a written notice to the tenant that the dwelling unit is equipped with a smoke detection device as required in *RCW 48.48.140. The notice shall inform the tenant of the tenant's responsibility to maintain the

smoke detection device in proper operating condition and of penalties for failure to comply with the provisions of *RCW 48.48.140(3). The notice must be signed by the landlord or the landlord's authorized agent and tenant with copies provided to both parties. Further, except with respect to a single-family residence, the written notice must also disclose the following:

(i) Whether the smoke detection device is hard-wired or battery operated;

(ii) Whether the building has a fire sprinkler system;

(iii) Whether the building has a fire alarm system;

(iv) Whether the building has a smoking policy, and what that policy is;

(v) Whether the building has an emergency notification plan for the occupants and, if so, provide a copy to the occupants;

(vi) Whether the building has an emergency relocation plan for the occupants and, if so, provide a copy to the occupants; and

(vii) Whether the building has an emergency evacuation plan for the occupants and, if so, provide a copy to the occupants.

(b) The information required under this subsection may be provided to a tenant in a multifamily residential building either as a written notice or as a checklist that discloses whether the building has fire

safety and protection devices and systems. The checklist shall include a diagram showing the emergency evacuation routes for the occupants.

(c) The written notice or checklist must be provided to new tenants at the time the lease or rental agreement is signed, and must be provided to current tenants as soon as possible, but not later than January 1, 2004;

(12) Provide tenants with information provided or approved by the department of health about the health hazards associated with exposure to indoor mold. Information may be provided in written format individually to each tenant, or may be posted in a visible, public location at the dwelling unit property. The information must detail how tenants can control mold growth in their dwelling units to minimize the health risks associated with indoor mold. Landlords may obtain the information from the department's web site or, if requested by the landlord, the department must mail the information to the landlord in a printed format. When developing or changing the information, the department of health must include representatives of landlords in the development process. The information must be provided by the landlord to new tenants at the time the lease or rental agreement is signed, and must be provided to current tenants no later than January 1, 2006, or must be posted in a visible, public location at the dwelling unit property beginning July 24, 2005;

(13) The landlord and his or her agents and employees are immune from civil liability for failure to comply with subsection (12) of this section except where the landlord and his or her agents and employees knowingly and intentionally do not comply with subsection (12) of this section; and

(14) Designate to the tenant the name and address of the person who is the landlord by a statement on the rental agreement or by a notice conspicuously posted on the premises. The tenant shall be notified immediately of any changes by certified mail or by an updated posting. If the person designated in this section does not reside in the state where the premises are located, there shall also be designated a person who resides in the county who is authorized to act as an agent for the purposes of service of notices and process, and if no designation is made of a person to act as agent, then the person to whom rental payments are to be made shall be considered such agent;

No duty shall devolve upon the landlord to repair a defective condition under this section, nor shall any defense or remedy be available to the tenant under this chapter, where the defective condition complained of was caused by the conduct of such tenant, his family, invitee, or other person acting under his control, or where a tenant unreasonably fails to allow the landlord access to the property for purposes of repair. When the duty imposed by subsection (1) of this section is incompatible with and greater than the duty imposed by any other provisions of this section,

the landlord's duty shall be determined pursuant to subsection (1) of this section.

RCW 59.18.115
Substandard and dangerous conditions – Notice to landlord – Government certification – Escrow account.

(1) The legislature finds that some tenants live in residences that are substandard and dangerous to their health and safety and that the repair and deduct remedies of RCW 59.18.100 may not be adequate to remedy substandard and dangerous conditions. Therefore, an extraordinary remedy is necessary if the conditions substantially endanger or impair the health and safety of the tenant.

(2)(a) If a landlord fails to fulfill any substantial obligation imposed by RCW 59.18.060 that substantially endangers or impairs the health or safety of a tenant, including (i) structural members that are of insufficient size or strength to carry imposed loads with safety, (ii) exposure of the occupants to the weather, (iii) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury, (iv) lack of water, including hot water, (v) heating or ventilation systems that are not functional or are hazardous, (vi) defective, hazardous, or missing electrical wiring or electrical service, (vii) defective or inadequate exits that increase the risk of injury to occupants, and (viii) conditions that increase the risk of fire, the tenant shall give notice in writing to the

landlord, specifying the conditions, acts, omissions, or violations. Such notice shall be sent to the landlord or to the person or place where rent is normally paid.

(b) If after receipt of the notice described in (a) of this subsection the landlord fails to remedy the condition or conditions within a reasonable amount of time under RCW 59.18.070, the tenant may request that the local government provide for an inspection of the premises with regard to the specific condition or conditions that exist as provided in (a) of this subsection. The local government shall have the appropriate government official, or may designate a public or disinterested private person or company capable of conducting the inspection and making the certification, conduct an inspection of the specific condition or conditions listed by the tenant, and shall not inspect nor be liable for any other condition or conditions of the premises. The purpose of this inspection is to verify, to the best of the inspector's ability, whether the tenant's listed condition or conditions exist and substantially endanger the tenant's health or safety under (a) of this subsection; the inspection is for the purposes of this private civil remedy, and therefore shall not be related to any other governmental function such as enforcement of any code, ordinance, or state law.

(c) The local government or its designee, after receiving the request from the tenant to conduct an inspection under this section, shall conduct the inspection and make any certification within a reasonable amount of time not more than five days from

the date of receipt of the request. The local government or its designee may enter the premises at any reasonable time to do the inspection, provided that he or she first shall display proper credentials and request entry. The local government or its designee shall whenever practicable, taking into consideration the imminence of any threat to the tenant's health or safety, give the landlord at least twenty-four hours notice of the date and time of inspection and provide the landlord with an opportunity to be present at the time of the inspection. The landlord shall have no power or authority to prohibit entry for the inspection.

(d) The local government or its designee shall certify whether the condition or the conditions specified by the tenant do exist and do make the premises substantially unfit for human habitation or can be a substantial risk to the health and safety of the tenant as described in (a) of this subsection. The certification shall be provided to the tenant, and a copy shall be included by the tenant with the notice sent to the landlord under subsection (3) of this section. The certification may be appealed to the local board of appeals, but the appeal shall not delay or preclude the tenant from proceeding with the escrow under this section.

(e) The tenant shall not be entitled to deposit rent in escrow pursuant to this section unless the tenant first makes a good faith determination that he or she is unable to repair the conditions described in the certification issued pursuant to subsection (2)(d)

of this section through use of the repair remedies authorized by RCW 59.18.100.

(f) If the local government or its designee certifies that the condition or conditions specified by the tenant exist, the tenant shall then either pay the periodic rent due to the landlord or deposit all periodic rent then called for in the rental agreement and all rent thereafter called for in the rental agreement into an escrow account maintained by a person authorized by law to set up and maintain escrow accounts, including escrow companies under chapter 18.44 RCW, financial institutions, or attorneys, or with the clerk of the court of the district or superior court where the property is located. These depositories are hereinafter referred to as "escrow." The tenant shall notify the landlord in writing of the deposit by mailing the notice postage prepaid by first-class mail or by delivering the notice to the landlord promptly but not more than twenty-four hours after the deposit.

(g) This section, when elected as a remedy by the tenant by sending the notice under subsection (3) of this section, shall be the exclusive remedy available to the tenant regarding defects described in the certification under subsection (2)(d) of this section: PROVIDED, That the tenant may simultaneously commence or pursue an action in an appropriate court, or at arbitration if so agreed, to determine past, present, or future diminution in rental value of the premises due to any defective conditions.

(3) The notice to the landlord of the rent escrow under this section shall be a sworn statement by the tenant in substantially the following form:

NOTICE TO LANDLORD
OF RENT ESCROW

Name of tenant:

Name of landlord:

Name and address of escrow:

Date of deposit of rent into escrow:

Amount of rent deposited into escrow:

The following condition has been certified by a local building official to substantially endanger, impair, or affect the health or safety of a tenant:

That written notice of the conditions needing repair was provided to the landlord on . . . , and . . . days have elapsed and the repairs have not been made.

. . . . . .

(Sworn Signature)

(4) The escrow shall place all rent deposited in a separate rent escrow account in the name of the escrow in a bank or savings and loan association domiciled in this state. The escrow shall keep in a

separate docket an account of each deposit, with the name and address of the tenant, and the name and address of the landlord and of the agent, if any.

(5)(a) A landlord who receives notice that the rent due has been deposited with an escrow pursuant to subsection (2) of this section may:

(i) Apply to the escrow for release of the funds after the local government certifies that the repairs to the conditions listed in the notice under subsection (3) of this section have been properly repaired. The escrow shall release the funds to the landlord less any escrow costs for which the tenant is entitled to reimbursement pursuant to this section, immediately upon written receipt of the local government certification that the repairs to the conditions listed in the notice under subsection (3) of this section have been properly completed.

(ii) File an action with the court and apply to the court for release of the rent on the grounds that the tenant did not comply with the notice requirement of subsection (2) or (3) of this section. Proceedings under this subsection shall be governed by the time, service, and filing requirements of RCW 59.18.370 regarding show cause hearings.

(iii) File an action with the court and apply to the court for release of the rent on the grounds that there was no violation of any obligation imposed upon the landlord or that the condition has been remedied.

(iv) This action may be filed in any court having jurisdiction, including small claims court. If the tenant has vacated the premises or if the landlord has failed to commence an action with the court for release of the funds within sixty days after rent is deposited in escrow, the tenant may file an action to determine how and when any rent deposited in escrow shall be released or disbursed. The landlord shall not commence an unlawful detainer action for nonpayment of rent by serving or filing a summons and complaint if the tenant initially pays the rent called for in the rental agreement that is due into escrow as provided for under this section on or before the date rent is due or on or before the expiration of a three-day notice to pay rent or vacate and continues to pay the rent into escrow as the rent becomes due or prior to the expiration of a three-day notice to pay rent or vacate; provided that the landlord shall not be barred from commencing an unlawful detainer action for nonpayment of rent if the amount of rent that is paid into escrow is less than the amount of rent agreed upon in the rental agreement between the parties.

(b) The tenant shall be named as a party to any action filed by the landlord under this section, and shall have the right to file an answer and counterclaim, although any counterclaim shall be dismissed without prejudice if the court or arbitrator determines that the tenant failed to follow the notice requirements contained in this section. Any counterclaim can only claim diminished rental value related to conditions specified by the tenant in the notice required

under subsection (3) of this section. This limitation on the tenant's right to counterclaim shall not affect the tenant's right to bring his or her own separate action. A trial shall be held within sixty days of the date of filing of the landlord's or tenant's complaint.

(c) The tenant shall be entitled to reimbursement for any escrow costs or fees incurred for setting up or maintaining an escrow account pursuant to this section, unless the tenant did not comply with the notice requirements of subsection (2) or (3) of this section. Any escrow fees that are incurred for which the tenant is entitled to reimbursement shall be deducted from the rent deposited in escrow and remitted to the tenant at such time as any rent is released to the landlord. The prevailing party in any court action or arbitration brought under this section may also be awarded its costs and reasonable attorneys' fees.

(d) If a court determines a diminished rental value of the premises, the tenant may pay the rent due based on the diminished value of the premises into escrow until the landlord makes the necessary repairs.

(6)(a) If a landlord brings an action for the release of rent deposited, the court may, upon application of the landlord, release part of the rent on deposit for payment of the debt service on the premises, the insurance premiums for the premises, utility services, and repairs to the rental unit.

(b) In determining whether to release rent for the payments described in (a) of this subsection, the court shall consider the amount of rent the landlord receives from other rental units in the buildings of which the residential premises are a part, the cost of operating those units, and the costs which may be required to remedy the condition contained in the notice. The court shall also consider whether the expenses are due or have already been paid, whether the landlord has other financial resources, or whether the landlord or tenant will suffer irreparable damage. The court may request the landlord to provide additional security, such as a bond, prior to authorizing release of any of the funds in escrow.

RCW 59.18.150
Landlord's right of entry – Purposes – Searches by fire officials – Conditions.

(1) The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.

(2) Upon written notice of intent to seek a search warrant, when a tenant or landlord denies a fire official the right to search a dwelling unit, a fire official may immediately seek a search warrant and, upon a showing of probable cause specific to the

dwelling unit sought to be searched that criminal fire code violations exist in the dwelling unit, a court of competent jurisdiction shall issue a warrant allowing a search of the dwelling unit.

Upon written notice of intent to seek a search warrant, when a landlord denies a fire official the right to search the common areas of the rental building other than the dwelling unit, a fire official may immediately seek a search warrant and, upon a showing of probable cause specific to the common area sought to be searched that a criminal fire code violation exists in those areas, a court of competent jurisdiction shall issue a warrant allowing a search of the common areas in which the violation is alleged.

The superior court and courts of limited jurisdiction organized under Titles 3, 35, and 35A RCW have jurisdiction to issue such search warrants. Evidence obtained pursuant to any such search may be used in a civil or administrative enforcement action.

(3) As used in this section:

(a) "Common areas" means a common area or those areas that contain electrical, plumbing, and mechanical equipment and facilities used for the operation of the rental building.

(b) "Fire official" means any fire official authorized to enforce the state or local fire code.

(4) The landlord may enter the dwelling unit without consent of the tenant in case of emergency or abandonment.

(5) The landlord shall not abuse the right of access or use it to harass the tenant. Except in the case of emergency or if it is impracticable to do so, the landlord shall give the tenant at least two days' notice of his or her intent to enter and shall enter only at reasonable times. The tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit at a specified time where the landlord has given at least one day's notice of intent to enter to exhibit the dwelling unit to prospective or actual purchasers or tenants. A landlord shall not unreasonably interfere with a tenant's enjoyment of the rented dwelling unit by excessively exhibiting the dwelling unit.

(6) The landlord has no other right of access except by court order, arbitrator or by consent of the tenant.

(7) A landlord or tenant who continues to violate the rights of the tenant or landlord with respect to the duties imposed on the other as set forth in this section after being served with one written notification alleging in good faith violations of this section listing the date and time of the violation shall be liable for up to one hundred dollars for each violation after receipt of the notice. The prevailing landlord or tenant may recover costs of the suit or arbitration under this section, and may also recover reasonable attorneys' fees.

(8) Nothing in this section is intended to abrogate or modify in any way any common law right or privilege.

ORDINANCE NO. 3231

AN ORDINANCE amending PMC 5.04.160(a) in regards to Rental-Dwelling Unit Business License Fees and creating new chapter PMC 5.78 entitled "Rental License" providing for the licensing and inspection of residential rental dwelling units.

WHEREAS, Washington legislature has by RCW 59.18.115 found that some residential tenants live in residences that are sub-standard and dangerous to their health and safety, and

WHEREAS, the City Council has determined there are likewise residential tenants within the city of Pasco living in residences that are sub-standard and potentially dangerous to their health and safety and that sub-standard rental housing has a deleterious effect on the value of nearby housing and may create an environment which creates an increased demand upon City protective services and thereby adversely effecting the health, safety and welfare of the citizens of the city of Pasco, and

WHEREAS, the City of Pasco, by the issuances of business licenses has the capacity to regulate business activities to protect the health, safety and welfare of all of the citizens of the city of Pasco, and

WHEREAS, the City council has conducted investigations, public hearings, public meetings, and received substantial amounts of testimony and evidence concerning the regulation of residential rental units for the benefit of promoting the health, safety

and welfare of each citizen of the city of Pasco, NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF PASCO, WASHINGTON DO ORDAIN AS FOLLOWS:

Section 1. That Sub-Section (a) entitled "Rentals-Dwelling Units" of PMC Section 5.04.160 "Fees" is hereby amended and shall read as follows:

> "5.04.160 Fees (a) Rentals-Dwelling Units. Any person renting or making available for rent to the public any dwelling unit shall secure a license registering each dwelling unit including a certification warranting that each such dwelling unit complies with the Uniform Housing Code as adopted by the City and does not present conditions that endanger or impair the health or safety of the tenants. For the purpose the this section, "dwelling unit" shall mean any structure or part of a structure which is used as a home, residence or sleeping place by one, two or more persons maintaining a common household, including but not limited to single family residences and units of multiplexes, apartment buildings and mobile homes. The annual business license fee shall be $15.00 for each independent business location and the first unit and $3.00 for each additional rental dwelling unit available for rental to the public by the applicant. All revenues received from this business license fee shall be utilized exclusively for the cost of issuance of the license provided herein and the administration of Chapter 5.78 of this title. Issuance of the business license shall be contingent upon submission of the certification, inspection,

as required by this title, payment of the fee provided above and compliance with Chapter 5.78 of this title."

Section 2. That new Chapter 5.78 entitled "Rental License" shall be added to the Pasco Municipal Code and is hereby adopted and shall read as follows:

"5.78.010 License Required. No person shall make available for rent, or rent, lease, or let, to the public any residential dwelling unit as defined in Section 5.04.160(a) of this title without securing and maintaining a current business license as required by this title."

"5.78.020 Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, the applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant including:

(1) structural members that are insufficient in size or strength to carry imposed loads with safety;

(2) exposure of the occupants to the weather;

(3) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury;

(4) lack of water, including hot water;

(5) heating or ventilation systems that are not functional or are hazardous;

(6) defective, hazardous, or missing electrical wiring or electrical service;

(7) defective or inadequate exits that increase the risk of injury to occupants;

(8) violations that increase the risks of fire; or

(9) violations of other applicable codes, rules or regulations.

(b) Timing of Inspection. To facilitate the availability of an inspection by each applicant, at the time of application, an inspection renewal period shall be established upon which the applicant shall submit its initial certificate of inspection and the corresponding renewal date of the certificate of inspection two years thereafter. The renewal periods shall be divided into calender [sic] quarters over a two year period and assigned to the applicant at the time of registration on a rotational basis. The first calendar quarter shall commence on the first day of January, terminating on the last day of March; the second calendar quarter shall commence on the first day of April and terminate on the last day of June; the third calendar quarter shall commence on first day July and terminate on the last day of September; and the fourth calendar quarter shall commence on the first day of October and terminate on the last day of December, with one half of which shall be scheduled in years ending with an even digit and the remaining half

being scheduled in years ending with an odd digit. Certificates of inspection shall be submitted no later than the last day of the applicant's assigned calendar quarter. During the first two years of the implementation of this ordinance, the applicant shall be granted a provisional business license pending the timely submission of its initial certificate of inspection.

(c) Inspectors. The applicant shall submit a certificate of inspection based upon the physical inspection of the dwelling units conducted not ~~less~~ more [/s/ cds] than 90 days prior to the date of the certificate of inspection and compliance certified by any of the following:

(1) a City of Pasco Code Enforcement Officer;

(2) inspectors certified by the United States Department of Housing and Urban Development for grant-required inspections;

(3) certified private inspectors approved by the City upon evidence of completion of formal training including the passing of an examination administered by the National Association of Housing and Redevelopment Officials (NAHRO), the American Association of Code Enforcement (AACE) or other comparable professional association as approved by the director of community development which approval or denial shall be subject to appeal to the Code Enforcement Board;

(4) a Washington licensed structural engineer;

(5) a Washington licensed architect.

All inspection certifications shall be submitted on forms provided by the City or approved by the United States Department of Housing and Urban Development.

(d) Other inspections. Nothing herein shall preclude such additional inspections as may be conducted pursuant to the tenant remedy provided by RCW 59.18.0115 of the Residential Landlord-Tenant Act; at the request or consent of a tenant, or issued pursuant to a warrant."

"5.78.030 Violations. (a) Any person violating any of the provisions or failing to comply with any of the requirements of this chapter, shall upon a finding that the act or omission had been committed, be punishable by a fine of not more than $500 dollars and shall be guiltily of a code infraction. Each such person is guilty of separate code infraction for each and every day during any portion of which any violation of any provision of this chapter is committed, continued, or permitted by such person and shall be punished as aforestated.

(b) Any person who knowingly submits or assists in the submission of a falsified certificate of inspection, or knowingly submits falsified information upon which a certificate of inspection is issued, shall, in addition to the penalties provided it subsection(a) above be guilty of a gross misdemeanor and shall be

punished by a fine of not more than $5,000 dollars or by imprisonment for a period of not more than six months, or both, such fine and imprisonment for each separate offense for each and every day during any portion of which any violation of this sub-section shall be committed.

(c) In addition to the penalties provided above, any violation of this chapter may result in the revocation of the business licenses provided in this title. Any violation of this chapter including, the determination by the City, after an inspection of the dwelling unit, that a condition exists which substantially endangers or impairs the health or safety of a tenant may, in addition to the penalties provided above, result in the issuance of a notice of civil violation be subject to the penalties as imposed under the provisions of this code."

Section 3. If any provision of this ordinance is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of this ordinance and the applicability thereof to persons and circumstances shall not be affected thereby.

Section 4. This ordinance shall take full force and effect on January 1, 1998.

PASSED by the City Council of the City of Pasco, Washington this 7th day of July, 1997

/s/ Charles D. Kilbury
Charles D. Kilbury
Mayor

ATTEST:

/s/ Catherine D. Seaman
Catherine D. Seaman
Deputy City Clerk

APPROVED AS TO FORM:

/s/ Leland B. Kerr
Leland B. Kerr
City Attorney

IN THE SUPERIOR COURT FOR
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof; COLUMBIA BASIN APARTMENT ASSOCIATION, a non-profit corporation organized under the laws of Washington, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA and MARIA GALEANA, Defendants.	FRANKLIN COUNTY SUPERIOR COURT NO. 99-2-50036-1 WASHINGTON STATE SUPREME COURT NO. 74270-7 **DESIGNATION OF CLERK'S PAPERS AND EXHIBITS**
COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES, MANUEL VALA and MARIA GALEANA, Third Party Plaintiffs, v. CITY OF PASCO, Third Party Defendant.	

Pursuant to RAP 9.6 and 9.7, Defendants hereby request that the Clerk of the above-referenced Court transmit to the Washington State Supreme Court, the following Clerk's papers and exhibits:

CLERK'S PAPERS

Sub No.	Date Filed	Document
1	1/26/1999	Summons & Complaint for Permanent Injunction to Enjoin Conduct of Rental Business Without a License
10	3/1/1999	Answer to Complaint Affirmative Defenses and Counterclaims
17	5/9/2000	Motion for Partial Summary Judgment
18	5/9/2000	Memorandum of Authorities in Support of Partial Summary Judgment
19	5/9/2000	Affidavit of Danny Rezendes
23	6/2/2000	Response to Defendant's Motion for Summary Judgment
24	6/20/2000	Answer to Defendant's Counterclaims
26	7/20/2000	Plaintiff's Motion for Partial Summary Judgment
27	7/20/2000	Supplemental Affidavit of Leland B. Kerr
32	9/1/2000	Memorandum of Authorities in Response to Plaintiff's Motion for Partial Summary Judgment

35	9/14/2000	Order Granting Partial Summary Judgment
42	1/7/2000	Columbia Basin Apartment Association's Motion to Intervene
44	1/14/2002	Stipulated Order Allowing Columbia Basin Apartment Association to Intervene as Party Defendant & 3rd Party Plaintiff
45	2/7/2002	Columbia Basin Apartment Association's Answer Affirmative Defense and Counterclaims
46	2/8/2002	Third Party Plaintiff's Motion for Summary Judgment
47	2/8/2002	Memorandum in Support of Summary Judgment
49	2/8/2002	Memorandum in Support of City's Motion for Summary Judgment
50	2/8/2002	Declaration of Sandra Fowler
52	2/26/2002	Answer to Counterclaim of Defendant Columbia Basin Apartment Association Answer
55	3/1/2002	City of Pasco's Response to Defendant and Intervenor Plaintiff's Motion for Summary Judgment.
56	3/4/2002	Tenant's Motion to Intervene

58	3/7/2002	Defendant 3rd Party Plaintiff's Response to City's Motion for Summary Judgment
59	3/11/2002	Order Allowing Tenants to Intervene as Party Defendants & Third Party Plaintiffs
60	3/13/2002	City's Reply to Defendant's/3rd Party Plaintiff's Response Memorandum
62	3/13/2002	Defendant's/3rd Party Plaintiff's Rebuttal to City's Response to Motion for Summary Judgment
66	9/26/2002	Order Granting Summary Judgment
69	10/28/2002	Order Granting Plaintiff's Partial Summary Judgment
70	11/20/2002	Notice of Appeal to Court of Appeals
71	4/11/2003	Certificate of Finality
73	5/13/2003	Plaintiff's Motion for Summary Judgment Against Defendant Shaw Issuance of Permanent Injunction
74	5/13/2003	Memorandum in Support of Plaintiff's Motion for Summary Judgment and Injunctive Relief
75	5/13/2003	Affidavit of Leland Kerr in Support of Plaintiff's Motion for Summary Judgment and Injunctive Relief

76	5/13/2003	Plaintiff's Motion to Dismiss
79	6/30/2003	Order Granting Summary Judgment
80	6/30/2003	Summary Judgment
81	7/21/2003	Notice of Discretionary Review to Supreme Court

There were no exhibits because the case was not tried.

The Washington State Supreme Court, has assigned Cause Number 74270-7 to this matter.

DATED this 19 day of September, 2003.

COWAN WALKER, P.S.
Attorneys for Defendants and
Third Party Plaintiffs

BY: /s/ Thomas A. Cowan
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IN THE SUPERIOR COURT FOR
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof; COLUMBIA BASIN APARTMENT ASSOCIATION, a nonprofit corporation organized under the laws of Washington, Defendants.	NO. 99-2-50036-1 COLUMBIA BASIN APARTMENT ASSOCIATION'S ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS
COLUMBIA BASIN APARTMENT ASSOCIATION, Third Party Plaintiff, v. CITY OF PASCO, Third Party Defendant.	

ANSWER

COMES NOW Defendant Columbia Basin Apartment Association (hereinafter referred to as the

"Association"), and by way of answer to the Complaint, admits, denies and alleges as follows:

1.1 By way of answer to Paragraph I of the Complaint, the Association admits that the Plaintiff is a political subdivision of the State of Washington and denies the remaining allegations. The Association further alleges that the Plaintiff has only those powers specifically granted to it by the State of Washington.

1.2 The Association admits Paragraph II of the Complaint.

1.3 The Association denies the allegations contained in the first sentence of Paragraph III. The Association admits that the City of Pasco Ordinance requires a business license. The Association admits that the Ordinance requires a search of every rental unit. The Association denies that the searches conducted by the City are limited to "minimal habitual conditions."

1.4 The Association denies each and every allegation of Paragraph IV of the Complaint.

1.5 The Association denies each and every allegation of Paragraph V of the Complaint.

1.6 The Association denies each and every allegation of Paragraph VI of the Complaint.

1.7 The Association denies each and every allegation of Paragraph VII of the Complaint.

1.8 The Association denies each and every allegation of Paragraph VIII of the Complaint.

AFFIRMATIVE DEFENSES

COMES NOW the Association and asserts the following affirmative defenses:

2.1 Members of the Association have consented to searches of their rental units by the City of Pasco's Enforcement Officer. Members of the Association have applied for and have tendered payment for their business licenses. The Association and its members have complied with the Ordinance to the extent they are legally able to do so.

2.2 The tenants occupying some of the rental units have refused to permit unauthorized searches of their homes. In response to the tenants' refusal to permit unauthorized searches of their home, the City of Pasco's Enforcement Officer has refused to search the apartments owned by members of the Association and has refused to issue inspection certificates. The City has failed to apply for search warrants to obtain legal access to the units of the tenants who refuse to consent to a search.

2.3 The City has failed to add each tenant who has refused to allow a search as a necessary party to this action.

2.4 The City's ordinance violates the provisions of the Fourth Amendment to the United States Constitution.

2.5 The City's ordinance violates Article I, Section 7 of the Washington State Constitution, and is unenforceable.

2.6 The City's ordinance is beyond the authority granted to the City by law and is unenforceable.

FIRST COUNTERCLAIM

3.1 On July 7, 1997, the Pasco City Council adopted the Ordinance, which amended certain sections of its Municipal Code for Rental-Dwelling Unit Business Licenses. The Ordinance, which became effective January 1, 1998, added new licensing and inspection requirements for residential rental units. In so doing, it expressly adopted the standards of the Washington Uniform Housing Code. The stated objectives of the Ordinance are to promote the health and safety of tenants residing in sub-standard rental units, eliminate the deleterious effect of substandard housing on the value of adjacent properties, and the general health, safety, and welfare of each citizen in the City of Pasco.

3.2 Section 2 of the Ordinance, enacting new chapter 5.78 of the Municipal Code, states, inter alia, that:

> 5.78.010 License Required. No person shall made [sic] available for rent, or rent, leave, or let, to the public any residential dwelling unit as defined in Section 5.04.160(a) of this title without securing and maintaining a current business license as required by this title.

> 5.78.020 Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, an applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant . . .

3.3 The explicit adoption of the Uniform Housing Code vests the Enforcement Officer with the discretion to exercise enforcement decisions on purely subjective criteria. It allows an inspector to cite violations of unspecified "other applicable, codes, rules or regulations." Consequently, the Ordinance gives insufficient notice to the defendant/third party plaintiff of what conduct or conditions may be illegal.

3.4 The Ordinance prohibits the rental of residential property without a license (Section 5.78.010), which the City will not issue in the absence of an inspection of each unit (Section 5.78.020). There is no provision for a grievance mechanism if a resident objects to the search of his or her home, nor is there a specific provision for the issuance of a search warrant if a resident denies entry to inspectors. Instead, the Ordinance mandates the warrantless entry and search of rental property irrespective of the consent of the owners or tenants.

3.5 The Ordinance imposes an annual "business license fee" of $30.00 for each independent business location and the first unit, and $3.00 for each additional rental dwelling unit available for rental to the

public by the applicant. This "fee" must be paid by the property owners in order to obtain the license required by the Ordinance to rent their property (Section 5.04.160).

3.6 In the summer of 1998, the City, through its Community Development Department's Code Enforcement Office, began its enforcement of the Ordinance. The Enforcement Officers demanded access to rental apartments without regard to the privacy interest of the residents. Typically, the Code Enforcement Office notifies property owners of the scheduled inspections but gives no notice to the tenants.

3.7 Certain owners of residential rental properties have permitted inspections with the consent of the tenants and thereafter the City has issued licenses.

3.8 In conducting the inspections, the Enforcement Officers have also looked for potential violations of "other applicable codes, rules or regulations" as permitted under the Ordinance (Section 5.78.020(9)).

3.9 Some tenants of members of the Association have refused to allow the search of their rental units. The City of Pasco has insisted that these rental unit owners must consent to a warrantless search of their tenants' homes. The City has never sought a judicial warrant to permit the inspection of a rental unit over the objection of the tenants.

3.10 When the tenants objected to the search and inspection of their homes, the City of Pasco threatened to impose fines and penalties against rental unit owners and to revoke their business licenses despite the fact that the other of their tenants agreed to inspections of their rental units.

3.11 The loss of the business licenses will mean that members of the Association will no longer be able to rent property in the City of Pasco, and will require that all of their tenants be forced to vacate their residences. This action places the owners of rental units and their tenants in violation of law solely because of the tenants' exercise of their right to privacy guaranteed by the Fourth Amendment.

3.12 The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized . . .

3.13 Certain individual tenants have not consented to the warrantless entry by government officials onto their property.

3.14 In the face of this exercise of constitutional rights, the City's decision to terminate or, in the

alternative, not issue business licenses will deprive the owners and tenants of due process.

3.15 Moreover, no search warrant should issue under these bare circumstances because the entries and searches envisioned by the Ordinance must occur whether or not probable cause exists to infer that a violation of the housing code or any statute has occurred.

SECOND COUNTERCLAIM

4.1 The Association hereby incorporates paragraph 3.1 through 3.15 of its First Counterclaim into this Second Counterclaim as if expressly set forth herein.

4.2 The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . .

4.3 The Uniform Housing Code is drafted as a set of guidelines for property management rather than as a regulatory framework specifying permissible and prohibited conduct. The Code Enforcement Office has considerable discretion to determine the classification and compliance of each building.

4.4 The City's application of the Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that the prohibitions and standards enforced are unconstitutionally vague, thereby depriving defendants of guaranteed due process. The Pasco City Council failed to establish minimal guidelines to govern the discretion of the Code Enforcement Office as constitutionally required, therefore depriving those subject to the Ordinance of fair notice.

4.5 The broad discretion of the Code Enforcement Officer has resulted in uneven enforcement where certain violations are waived while other [sic] are enforced.

PRAYER FOR RELIEF

WHEREFORE, the Association respectfully requests that this Court grant them the following relief:

1. Dismiss the City's Complaint with prejudice;

2. Restrain and enjoin the City, its agents, servants, and employees from conducting nonconsensual inspections under the Ordinance without a proper warrant;

3. Require that any application for warrants specify why the affiant believes the premises are not in compliance with the Code and shall issue only on a finding of probable cause;

4. Require any warrants requested for inspections pursuant to the Ordinance to clearly demarcate the purposes and time limitations of such inspections;

5. Restrain and enjoin the City, its agents, servants, and employees from exceeding the explicit scope of authority granted by any such warrants;

6. Restrain the City, its agents, servants, and employees from enforcing the Ordinance, or penalizing residents or owners for refusal to consent to unconstitutional searches authorized by the Ordinance until such time as the Plaintiff promulgates clearly delineated guidelines limiting discretionary enforcement of the Ordinance;

7. Restrain and enjoin the City, its agents, servants and employees from, in instances where the tenants or owners either fail or refuse to consent to inspections, revoking or terminating the owners' business license, or taking any other retaliatory action against the owners or tenants of such buildings in lieu proceeding to get an appropriate warrant;

8. Award the Association its costs, including reasonable attorneys' fees; and

9. Award such other and further relief as this Court deems proper and just.

DATED this 6th of February, 2002.

STATEMENT OF MAILING

I declare under penalty of perjury under the laws of the State of Washington that on Feb. 7, 2002 a copy of this document was forwarded to the attorneys of record for Pltf. ( ) by mails, postage paid (✓) by messenger service.

/s/ K. Dewitt
Richland, Washington

COWAN WALKER, P.S.

By: /s/ Lucinda J. Luke
Thomas A. Cowan,
WSBA #5029
Lucinda J. Luke,
WSBA #26783

IN THE SUPERIOR COURT FOR THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, vs. BERNARD N. SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Defendants.	NO. 99-2-50036-1 ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

COME NOW the defendants, BERNARD N. SHAW and B. JEAN SHAW, and by way of answer to the Complaint, admit, deny and allege as follows:

1. By way of answer to Paragraph I of the Complaint, the defendants admit that the plaintiff is a political subdivision of the State of Washington and the defendants deny the remaining allegations. By way of further answer to the paragraph, the defendants allege that the plaintiff has only those powers specifically granted to it by the State of Washington.

2. The defendants admit paragraph II of the Complaint.

3. By way of answer to Paragraph III of the Complaint, the defendants deny the allegations contained in the first sentence of the paragraph. The defendants admit that the City of Pasco Ordinance

requires a business license. The defendants admit that the Ordinance requires a search of every rental unit. The defendants deny that the searches are limited to "minimal habitual conditions".

4. By way of answer to Paragraph IV, the defendants deny each and every allegation.

5. By way of answer to Paragraph V, the defendants deny each and every allegation.

6. By way of answer to Paragraph VI, the defendants deny each and every allegation.

7. By way of answer to Paragraph VII, the defendants deny each and every allegation.

8. By way of answer to Paragraph VIII, the defendants deny each and every allegation.

COME NOW, the defendants, and by way of affirmative defense allege:

9. The defendants have consented to a search of their rental units by the City of Pasco Enforcement Officer. The defendants have applied for and have tendered payment for a 1999 business license and the plaintiff has refused to issue a license to the defendants. The defendants have complied with the Ordinance to the extent they are legally able to do so.

COME NOW the defendants and for a second affirmative defense allege:

10. The tenants occupying some of the rental units have refused to permit unauthorized searches of their homes.

11. In response to the tenants' refusal to permit unauthorized searches of their home, the City of Pasco Enforcement Officer has refused to search the apartments owned by the defendants and has refused to issue an inspection certificate.

12. The plaintiff has failed to apply for search warrants to obtain access to the units of the tenants who refuse to consent to a search.

COME NOW the defendants and for a third affirmative defense allege:

13. The plaintiff has failed to add each defendant who has refused to allow a search as a necessary party to this action.

COME NOW the defendants and for a fourth affirmative defense allege:

14. The plaintiffs' Ordinance violates the provisions of the Fourth Amendment to the United State [sic] Constitution which is made applicable to the plaintiff by the Fourteenth Amendment to the United States Constitution and is enforceable.

COME NOW the defendants and for a fifth affirmative defense allege:

15. The plaintiffs Ordinance violates Article I, Section 7 of the Washington State Constitution, and is unenforceable.

COME NOW the defendants and for a sixth affirmative defense allege:

16. The plaintiffs Ordinance is beyond the authority granted to the City by law and is unenforceable.

COME NOW the defendants, and by way of a Counterclaim allege:

FIRST COUNTERCLAIM

17. On July 7, 1997, the Pasco City Council adopted the Ordinance, which amended certain sections of its Municipal Code for Rental-Dwelling Unit Business Licenses. The Ordinance, which became effective January 1, 1998, added new licensing and inspection requirements for residential rental units. In so doing, it expressly adopted the standards of the Washington Uniform Housing Code. The stated objectives of the Ordinance are to promote the health and safety of tenants residing in sub-standard rental units, eliminate the deleterious effect of substandard housing on the value of adjacent properties, and the general health, safety, and welfare of each citizen in the City of Pasco.

18. Section 2 of the Ordinance, enacting new chapter 5.78 of the Municipal Code, states, inter alia, that:

> 5.78.010 License Required. No person shall make available for rent, or rent, lease, or let, to the public any residential dwelling unit as defined in Section 5.04.160(a) of this title

> without securing and maintaining a current business license as required by this title.
>
> 5.78.020 Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, an applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant . . .

19. The explicit adoption of the Uniform Housing Code vests the Enforcement Office with the discretion to exercise enforcement decisions on purely subjective criteria. It allows an inspector to cite violations of unspecified "other applicable codes, rules or regulations." Consequently the Ordinance gives insufficient notice to defendants of what conduct or conditions may be illegal.

20. The Ordinance prohibits the rental of residential property without a license (Section 5.78.010), which the City will not issue in the absence of an inspection of each unit (Section 5.78.020). There is no provision for a grievance mechanism if a resident objects to the search of his or her home, nor is there a specific provision for the issuance of a search warrant if a resident denies entry to inspectors. Instead, the Ordinance mandates the warrantless entry and search of rental property irrespective of the consent of the owners or occupants.

21. The Ordinance imposes an annual "business license fee" of $30.00 for each independent business

location and the first unit and $3.00 for each additional rental dwelling unit available for rental to the public by the applicant. This "fee" must be paid by the property owners in order to obtain the license required by the Ordinance to rent their property. (Section 5.04.160).

22. In the summer of 1998, the City, through its Community Development Department's Code Enforcement Office, began its enforcement of the Ordinance. The Enforcement Officers demanded access to rental apartments without regard to the privacy interests of the residents. Typically, the Code Enforcement Office notifies property owners of the scheduled inspections but gives no notice to the residents.

23. Certain owners of residential rental properties have permitted inspections with the consent of the tenants and thereafter the City has issued licenses.

24. In conducting the inspections, the Enforcement Officers have also looked for potential violations of "other applicable codes, rules or regulations" as permitted under the Ordinance. (Section 5.78.020(9)):

25. Tenants of the defendants, Bernard and Jean Shaw, have refused to allow the search of their rental units. The City of Pasco has insisted that these defendants must consent to a warrantless search of their tenants' homes. The City has never sought a judicial warrant to permit the inspection of a rental unit over the objection of the occupants.

26. When the tenants objected to the search and inspection of their homes, the City of Pasco threatened to impose fines and penalties against the defendants, and to revoke their business licenses, despite the fact that the other residents had agreed to inspections of their apartment units. The City has refused to issue 1999 licenses to the defendants.

27. The loss of the business licenses will mean that the Shaw's can no longer rent property in the City of Pasco, and their tenants would he forced to vacate their residences. This action placed the owners of the building and the tenants of the other units in violation of law solely because of the tenants' exercise of their right to privacy guaranteed by the Fourth Amendment.

28. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

29. The individual tenants have not consented, to the warrantless entry by government officials onto their property.

30. In the face of this exercise of constitutional rights, the City's decision to terminate or, in the

alternative, not issue business licenses will deprive the owners and residents of due process.

31. Moreover, no search warrant should issue under these bare circumstances because the entries and searches envisioned by the Ordinance must occur whether or not probable cause exists to infer that a violation of the housing code or any statute has occurred.

SECOND COUNTERCLAIM

32. Defendants hereby incorporate paragraph 17 through 31 of their First Counterclaim into this Second Counterclaim as if expressly set forth herein.

33. The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law: . . .

34. The Uniform Housing Code is drafted as a set of guidelines for property management rather than as a regulatory framework specifying permissible and prohibited conduct. The Code Enforcement Office has considerable discretion to determine the classification and compliance of each building.

35. The City's application of the Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that

the prohibitions and standards enforced are unconstitutionally vague, thereby depriving defendants of guaranteed due process. The Pasco City Council failed to establish minimal guidelines to govern the discretion of the Code Enforcement Office as constitutionally required, therefore deprived those subject to the Ordinance of fair notice.

36. The broad discretion of the Code Enforcement Office has resulted in uneven enforcement where certain violations are waived while others are enforced.

THIRD COUNTERCLAIM

37. Defendants hereby incorporate paragraphs 17 through 36 of their Answer into this Third Counterclaim as if expressly set forth herein.

38. Article 11, § 11 of the Washington State Constitution provides that:

> Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

39. This Constitutional provision delegating police power to municipalities to make and enforce within its limits such regulations did not comprehend the power to tax.

40. There is no specific legislative or constitutional authority delegating the power to tax in connection with the Ordinance to the City of Pasco.

41. The primary purpose of the fee provision (5.04.160) of the Ordinance is to raise revenue, not to regulate.

42. The funds being collected pursuant to the Ordinance's "fee" provision are used for purposes other than the regulation of rental dwellings in the City of Pasco, such as eliminating the "deleterious effect on the value of nearby housing" and decreasing the "demand upon city protective services."

43. There is no benefit or service provided to property owners as a result of paying the license "fees" imposed by the Ordinance.

44. There is no direct relationship between the license "fees" imposed by the Ordinance and any alleged burden produced by owners of rental properties in the City of Pasco.

45. The fees imposed on the owners of residential rental units by the Ordinance constitute an illegal, impermissible, and unauthorized tax in violation of Article 11, §11 to the Washington State Constitution.

DEFENDANTS' PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully request that this Court grant them the following relief:

1. Dismiss the Complaint with prejudice.

2. Enter an order declaring the license "fees" imposed by the Ordinance to be an illegal and impermissible tax;

3. Requiring the plaintiffs to disgorge amounts collected thus far under the Ordinance, with interest thereon at the legal rate or other reasonable rate determined by the Court;

4. Restraining and enjoining the Plaintiff, its agents, servants, and employees from enforcing, collecting, or otherwise implementing the "fees" imposed by the Ordinance;

5. Restraining and enjoining the Plaintiff, its agents, servants, and employees from conducting nonconsensual inspections under the Ordinance without a proper warrant;

6. Requiring that any application for warrants specify why the affiant believes the premises are not in compliance with the Code and shall issue only on a finding of probable cause;

7. Requiring any warrants requested for inspections pursuant to the Ordinance to clearly demarcate the purposes and time limitations of such inspections;

8. Restraining and enjoining the Plaintiff, its agents, servants, and employees from exceeding the explicit scope of authority granted by any such warrants;

9. Restraining Plaintiff, its agents, servants, and employees from enforcing the Ordinance, charging the "fees" mandated thereby, or penalizing residents or owners for refusal to consent to the unconstitutional searches authorized by the Ordinance until such time as the Plaintiff promulgates

clearly delineated guidelines limiting discretionary enforcement of the Ordinance;

10. Restraining and enjoining the Plaintiff, its agents, servants, and employees from, in instances where the residents or owners either fail or refuse to consent to inspections, revoking or terminating the owners' business license, or taking any other retaliatory action against the owners or residents of such buildings in lieu of proceeding to get an appropriate warrant;

11. Awarding Defendants their costs, including reasonable attorneys' fees; and

12. Awarding such other relief as this Court deems proper and just.

DATED this 24 day of February, 1999.

COWAN WALKER, P.S.

/s/ Thomas A. Cowan

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA BASIN APARTMENT ASSOCIATION, BERNARD and JEAN SHAW, ROBERT and JOAN LAWRENCE, ROBERT LEE GAINES and BILLIE JEAN S. GAINES, MANUEL VALA and MARIA GALEANA,	NO. CT-99-5013-RHW
Plaintiffs,	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
v.	(Filed Feb. 5, 1999)
CITY OF PASCO,	
Defendant.	

This case involves a constitutional challenge to the City of Pasco's application of Ordinance No. 3231 (the "Ordinance"). The Ordinance, as enforced by the City of Pasco, authorizes non-consensual warrantless searches of residential rental units. The City's application of the Ordinance is constitutionally

invalid because it: (i) violates the constitutional protection from unreasonable searches and seizures set forth in the Fourth Amendment to the Constitution of the United States; (ii) is unconstitutionally vague, thereby depriving Plaintiffs of due process guaranteed by the Fourteenth Amendment to the U.S. Constitution; and, (iii) mandates the payment of "fees" which constitute an illegal tax.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 in that it involves claims arising under the United States Constitution and seeks declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202, and attorneys' fees pursuant to 42 U.S.C. §1988.

2. Venue in this Court is proper under 28 U.S.C. §1391(b).

PARTIES

3. Plaintiff Columbia Basin Apartment Association is a nonprofit corporation organized under the laws of Washington. Its membership consists of individuals and corporations engaged in the ownership and management of rental housing in the City of Pasco and in Franklin County.

4. Plaintiffs Robert Lawrence and Joan Lawrence are owners of rental dwelling units in the City

of Pasco, which are located at 2508 E. Lewis Street. These dwelling units are subject to the licensure and inspections mandated by the Ordinance. The Lawrences have paid, under protest, licensing fees mandated by the Ordinance.

5. Plaintiffs Bernard and Jean Shaw are the owners of rental dwelling units in the City of Pasco, which are located at 1209 Road 40 and 1714, 1716, and 1720 North 10th Avenue. These dwelling units are subject to the licensure and inspections mandated by the Ordinance. The Shaws have paid, under protest, licensing fees mandated by the Ordinance.

6. Plaintiffs Robert Lee Gaines and Billie Jean S. Gaines are tenants of Plaintiffs Robert and Joan Lawrence. They reside at #4 House 2508 E. Lewis Street, Pasco, Washington 99301. Their residence is subject to the inspections mandated by the Ordinance.

7. Plaintiffs Manuel Vala and Maria Galeana, are tenants of Plaintiffs Bernard and Jean Shaw. They reside at 1716 N. 10th, Apt. B, Pasco, Washington 99301. Their residence is subject to the inspections mandated by the Ordinance.

8. Defendant City of Pasco is a municipal corporation incorporated and operating pursuant to the Washington Constitution. Through its Code Enforcement Office, the City of Pasco is responsible for enforcing and otherwise implementing the Ordinance.

FACTS

9. On July 7, 1997, the Pasco City Council adopted the Ordinance, which amended certain sections of its Municipal Code for Rental-Dwelling Unit Business Licenses. The Ordinance, which became effective January 1, 1998, added new licensing and inspection requirements for residential rental units. In so doing, it expressly adopted the standards of the Washington Uniform Housing Code. The stated objectives of the Ordinance are to promote the health and safety of tenants residing in sub-standard rental units, eliminate the deleterious effect of substandard housing on the value of adjacent properties, and the general health, safety, and welfare of each citizen in the City of Pasco.

10. Section 2 of the Ordinance, enacting new chapter 5.78 of the Municipal Code, states, inter alia, that:

> 5.78.010 License Required. No person shall make available for rent, or rent, lease, or let, to the public any residential dwelling unit as defined in Section 5.04.160(a) of this title without securing and maintaining a current business license as required by this title.
>
> 5.78.020 Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, an applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and

> do not present conditions that endanger or impair the health or safety of a tenant . . .

11. The explicit adoption of the Uniform Housing Code vests the Enforcement Office with the discretion to exercise enforcement decisions on purely subjective criteria. It allows an inspector to cite violations of unspecified "other applicable codes, rules or regulations." Consequently the Ordinance gives insufficient notice to Plaintiffs and other citizens of what conduct or conditions may be illegal.

12. The Ordinance prohibits the rental of residential property without a license (Section 5.78.010), which the City will not issue in the absence of an inspection of each unit (Section 5.78.020). There is no provision for a grievance mechanism if a resident objects to the search of his or her home, nor is there a specific provision for the issuance of a search warrant if a resident denies entry to inspectors. Instead, the Ordinance mandates the warrantless entry and search of rental property irrespective of the consent of the owners or occupants.

13. The Ordinance imposes an annual "business license fee" of $15.00 for each independent business location and the first unit and $3.00 for each additional rental dwelling unit available for rental to the public by the applicant. This "fee" must be paid by the property owners in order to obtain the license required by the Ordinance to rent their property. (Section 5.04.160). The annual fee of $15.00 for each

independent business location has been raised to $30.00 effective January 1, 1999.

14. In the summer of 1998, the City, through its Community Development Department's Code Enforcement Office, began its enforcement of the Ordinance. The Enforcement Officers demanded access to rental apartments without regard to the privacy interests of the residents. Typically, the Code Enforcement Office notifies property owners of the scheduled inspections but gives no notice to the residents.

15. Certain owners of residential rental properties have permitted inspections with the consent of the tenants and thereafter the City has issued licenses.

16. In conducting the inspections, the Enforcement Officers have also looked for potential violations of "other applicable codes, rules or regulations" as permitted under the Ordinance. (Section 5.78.020(9)).

17. In other cases, including that of Plaintiffs Bernard and Jean Shaw and Robert and Joan Lawrence, tenants including Billie Jean S. Gaines, Manuel Vala and Maria Galeana have refused to allow the search of their rental units. The City of Pasco has insisted that these Plaintiffs must consent to a warrantless search of their homes.

The City has never sought a judicial warrant to permit the inspection of a rental unit over the objection of the occupants.

18. When the Plaintiffs objected to the search and inspection of their rental dwellings, the City of Pasco threatened to impose fines and penalties against the Shaws and Lawrences, and to revoke their business licenses, despite the fact that the other residents had agreed to inspections of their apartment units. The City will not issue 1999 licenses for uninspected properties.

19. The loss of the business licenses will mean that the Shaws and Lawrences can no longer rent property in the City of Pasco, and their tenants would be forced to vacate their residences. This action placed the owners of the building and the tenants of the other units in violation of law solely because of the tenants' exercise of their right to privacy guaranteed by the Fourth Amendment.

COUNT ONE

20. Plaintiffs hereby incorporate paragraphs 1 through 19 of this Complaint into this Count One as if expressly set forth herein.

21. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

> the place to be searched, and the persons or things to be seized . . .

22. The individual Plaintiffs have not consented, nor will they consent, to the warrantless entry by government officials onto their property.

23. In the face of this exercise of constitutional rights, the City's decision to terminate or, in the alternative, not issue business licenses will deprive the owners and residents of due process.

24. Moreover, no search warrant should issue under these bare circumstances because the entries and searches envisioned by the Ordinance must occur whether or not probable cause exists to infer that a violation of the housing code or any statute has occurred.

COUNT TWO

25. Plaintiffs hereby incorporate paragraphs 1 through 24 of this Complaint into this Count Two as if expressly set forth herein.

26. The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law: . . .

27. The Uniform Housing Code is drafted as a set of guidelines for property management rather than as a regulatory framework specifying permissible and prohibited conduct. The Code Enforcement Office has considerable discretion to determine the classification and compliance of each building.

28. The City's application of the Ordinance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that the prohibitions and standards enforced are unconstitutionally vague, thereby depriving Plaintiffs of guaranteed due process. The Pasco City Council failed to establish minimal guidelines to govern the discretion of the Code Enforcement Office as constitutionally required, therefore depriving those subject to the Ordinance of fair notice.

29. The broad discretion of the Code Enforcement Office has resulted in uneven enforcement where certain violations are waived while others are enforced.

COUNT THREE

30. Plaintiffs hereby incorporate paragraphs 1 through 29 of this Complaint into this Count Three as if expressly set forth herein.

31. Article 11, § 11 of the Washington State Constitution provides that:

> Any county, city, town or township may make and enforce within its limits all such local

police, sanitary and other regulations as are not in conflict with general laws.

32. This Constitutional provision delegating police power to municipalities to make and enforce within its limits such regulations did not comprehend the power to tax.

33. There is no specific legislative or constitutional authority delegating the power to tax in connection with the Ordinance to the City of Pasco.

34. The primary purpose of the fee provision (5.04.160) of the Ordinance is to raise revenue, not to regulate.

35. The funds being collected pursuant to the Ordinance's "fee" provision are used for purposes other than the regulation of rental dwellings in the City of Pasco, such as eliminating the "deleterious effect on the value of nearby housing" and decreasing the "demand upon city protective services."

36. There is no benefit or service provided to property owners as a result of paying the license "fees" imposed by the Ordinance.

37. There is no direct relationship between the license "fees" imposed by the Ordinance and any alleged burden produced by owners of rental properties in the City of Pasco.

38. The fees imposed on the owners of residential rental units by the Ordinance constitute an

illegal, impermissible, and unauthorized tax in violation of Article 11, §11 to the Washington State Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief:

1. Enter an order declaring the license "fees" imposed by the Ordinance to be an illegal and impermissible tax;

2. Requiring the Defendant to disgorge amounts collected thus far under the Ordinance, with interest thereon at the legal rate or other reasonable rate determined by the Court;

3. Restraining and enjoining the Defendant, its agents, servants, and employees from enforcing, collecting, or otherwise implementing the "fees" imposed by the Ordinance;

4. Restraining and enjoining the Defendant, its agents, servants, and employees from conducting nonconsensual inspections under the Ordinance without a proper warrant;

5. Requiring that any application for warrants specify why the affiant believes the premises are not in compliance with the Code and shall issue only on a finding of probable cause;

6. Requiring any warrants requested for inspections pursuant to the Ordinance to clearly demarcate the purposes and time limitations of such inspections;

7. Restraining and enjoining the Defendant, its agents, servants, and employees from exceeding the explicit scope of authority granted by any such warrants;

8. Restraining Defendant, its agents, servants, and employees from enforcing the Ordinance, charging the "fees" mandated thereby, or penalizing residents or owners for refusal to consent to the unconstitutional searches authorized by the Ordinance until such time as the Defendant promulgates clearly delineated guidelines limiting discretionary enforcement of the Ordinance;

9. Restraining and enjoining the Defendant, its agents, servants, and employees from, in instances where the residents or owners either fail or refuse to consent to inspections, revoking or terminating the owners' business license, or taking any other retaliatory action against the owners or residents of such buildings in lieu of proceeding to get an appropriate warrant;

10. Awarding Plaintiffs their costs, including reasonable attorneys' fees; and

11. Awarding such other relief as this Court deems proper and just.

DATED this 4 day of February, 1999.

COWAN WALKER, P.S.

/s/ Thomas A. Cowan
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Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FRANKLIN

CITY OF PASCO, Plaintiff, v. BERNARD N. SHAW and B. JEAN SHAW, husband and wife and the marital community composed thereof, Defendants.	NO. 99 2 50036 1 COMPLAINT FOR PERMANENT INJUNCTION TO ENJOIN CONDUCT OF RENTAL BUSINESS WITHOUT A LICENSE (Filed Jan. 26, 1999)

COMES NOW the City of Pasco, Washington, by and through its attorneys of record, EVANS, KERR, HANEY & HILTON, P.S., and for cause of action state as follows:

I.

That the City of Pasco, Washington, is a code city municipal corporation constituting a political subdivision in the State of Washington, and is granted by law the right of regulating businesses within its jurisdiction.

II.

That the Defendants, Bernard Shaw and Jean Shaw, are husbands [sic] and wife, and at all times

material hereto constitute a marital community residing in Pasco, Franklin County, Washington, and owners of certain rental dwellings located at 1714 N. 10th Avenue, 1716 N. 10th Avenue, 1720 N. 10th Avenue, and 1209 Rd. 40, all located within the city limits of the City of Pasco, Washington.

III.

The Plaintiffs, the City of Pasco, is authorized under the laws of the State of Washington, to enact and enforce, pursuant to its police powers, regulations over business activities conducted within its jurisdiction. The Pasco Municipal Code Section 5.78.010 requires a business license for any persons renting or leasing residential units. As condition for the issuance of a business license, Pasco Municipal Code 5.78.020 requires a certificate inspection of the rental dwelling units demonstrating minimal habitual condition.

IV.

That the Defendants, Bernard Shaw and Jean Shaw, have failed and refused to provide a Certificate of Inspection, a necessary element of their application for a 1999 Business License, and as a result are ineligible for and have not secured a business license for conducting business for the year 1999 within the city limits.

V.

In spite of the failure to secure the required business license, said Defendants continue to engage in the business of renting, leasing or letting to the public residential dwelling units without procuring the required business license which conduct should be ordered abated and such dwelling units vacated until such times as the Defendants are fully in compliance with the law.

VI.

That Pasco Municipal Code 5.78.030 provides that "any person violating any of the provisions or failing to comply with any of the requirements of this chapter (residential license) shall upon a finding that the act or omission had been committed, be punishable by a fine of not more than $500.00 and shall be guilty of a code infraction. Each such person is guilty of a separate code infraction for each and every day during any portion of which any violation of any provisions of this chapter is committed, continued or permitted by such person and shall be punished as aforesaid." Said Defendants have been engaged in a business of renting, leasing or letting to the public residential dwelling units without a business license from and after January 1, 1999, and should be assessed a fine of $500.00 for each day of violation until the Defendants either cease conducting business without a license or secure the necessary business licenses.

VII.

Plaintiff, City of Pasco, may sustain irreparable harm and the safety of its citizens jeopardized by reason of the Defendants' failure and refusal to secure a valid business license in violation of the law. Such irreparable harm will continue unless the violations are enjoined by this Court. Further, the Plaintiff, City of Pasco, is without an adequate remedy at law to prevent such violation. Therefore, the Defendants should be enjoined as requested below.

VIII.

The City of Pasco cannot be fully compensated in damages for the harm resulting from the Defendants' conduct and threatened conduct and is without an adequate remedy at law in that the extent of damages the City will sustain in connection with or as a result of such conduct is impossible to ascertain.

WHEREFORE, the Plaintiff prays for the following relief:

1. That the Defendants be ordered to show cause why a preliminary injunction should not be issued enjoining the Defendants and all persons in concert or participating with them from conducting residential rental business within the City of Pasco without a required license and requiring all rental units without appropriate licenses to be vacated.

2. That the Defendants and all persons acting in concert or participating with them be permanently

enjoined from conducting the business of residential rentals within the City of Pasco without a valid business license.

3. For determination that the Defendants are guilty of an infraction for each day of violation of conducting business within the City of Pasco without a residential business license and judgements against the Defendants in an amount equal to $500.00 for each day of violation.

4. An Abatement Order ordering Defendants to cease and desist all business activity on renting, leasing, or letting to the public any residential dwelling unit and requiring the vacating of all premises let in violation of this Ordinance;

5. The Plaintiffs costs and attorney fees incident to the prosecution of this action;

6. For such other and further reliefs that the Court deems just and equitable in the premises.

DATED 26th day of January, 1999.

EVANS, KERR, HANEY & HILTON, P.S.

/s/ Leland B. Kerr
LELAND B. KERR,
WSBA No. 6059
Attorneys for City of Pasco

STATE OF WASHINGTON)
: ss
COUNTY OF Benton)

Richard Smith, being first duly sworn, upon oath, deposes and states: that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

/s/ Richard Smith
Richard Smith

SUBSCRIBED and SWORN to before me this 26th day of January, 1999.

/s/ Leland B. Kerr
Notary Public in and for the State of Washington, residing at: Kennewick
My Commission Expires: 3/1/2000

85

No. 07-788

FILED

FEB 8 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BERNARD N. SHAW and B. JEAN SHAW, COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA, and MARIA GALEANA,

Petitioners,

v.

CITY OF PASCO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Washington Supreme Court has applied its analytical framework of the rights afforded Petitioners under Article 1, Section 7 of the Washington Constitution, which bestows greater protections upon Petitioners against governmental searches than the rights bestowed by the Fourth Amendment of the United States Constitution.

2. Whether Petitioners have presented compelling reasons to grant the Petition where the Petitioners failed to demonstrate the existence of a federal right that triggers the due process requirements of notice and hearing, and where the instant proceeding actually originated in a state court action filed by Respondent for the purpose of enforcing the ordinance at issue and seeking to enjoin landlord Petitioners from operating a business in violation of the Ordinance.

3. Whether Petitioners have presented compelling reasons to grant the Petition where the rigorous constitutional analysis applied by every court below does not conflict with a decision of this Court on an important federal question, and where Petitioners do not claim that the Washington Supreme Court's ruling implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

The Ordinance at issue here was adopted by the City of Pasco in response to a serious and growing problem with substandard and dangerous rental housing, often rented to tenants of limited means who lacked the knowledge or ability to hold the landlord responsible for the condition of the units. The extensive record detailing the legislative history of the Ordinance was provided to the court below which vividly summarized the state of affairs in Pasco, Washington as follows:

> In the 1990s, the city of Pasco faced problems with a number of substandard rental housing units. For example the landlords involved in this case owned rental units for which there was no working source of heat. Tenants were told they had to provide their own heat via portable electric space heaters. In addition, kitchens contained no vent, hood, fan, or window, despite the fact that natural gas was used to heat them. In one building, windows were not properly installed, allowing weather to enter the wall. Plumbing was in such disrepair that a bucket had to be used to catch water draining from a bathroom sink. One unit was infested with cockroaches. Some units had unsound wall finishes and warped or buckled walls.
>
> One of the Shaws' tenants complained that they were refusing to make necessary repairs to her apartment. For some time,

> neither the heat nor the air conditioning worked. The doors did not open unless she resorted to using a knife or plastic card. Both the bathroom and kitchen sinks drained into buckets. The shower wall was collapsing and the kitchen and bathroom floors were rotting. When the tenant demanded either repairs, placement into a better rental unit, or refund of her deposit so she could move out, the apartment manager told her that if she continued to complain, he would have her deported.

Pasco v. Shaw, 161 Wash. 2d 450, 166 P.3d 1157, 1159 (2007). In response to the obvious rental housing crisis faced by the citizens of Pasco, the City Council investigated every potential method of regulating the habitability of rental units. Because Washington law does not provide a method for the issuance of administrative search warrants, a housing inspection program such as those utilized in other states was not available. However, the City has broad police authority to regulate businesses that operate within its boundaries and the Council recognized that landlords are indeed commercial businesses. Accordingly, the City Council adopted Ordinance 3231 as a method of regulating all commercial operations that were offering dwelling units to the public for rent. The vast majority of landlords readily complied with the law. However, Petitioners Shaw, whose properties provided proof of some of the worst living conditions for tenants in the City, resisted the requirement that they provide a certification to the City that their

units were in compliance with the Uniform Housing Code and did not present a danger to their tenants. The City's action for injunctive relief followed the Shaws' refusal to submit such a certification, the expiration of their business license due to the lack of such certification, and their continued operation of their rental business in blatant violation of the licensing ordinance.

The Petitioners have challenged the constitutionality of this licensing program on its face and assert that it is overly vague and violates the Fourth and Fourteenth Amendment rights of landlords and tenants alike. Contrary to this assertion, the Ordinance provides clear and concise direction to rental businesses as to the conditions for issuance of a City business license, establishes a standardized process for obtaining the requisite certification of habitability from a qualified private inspector, and imposes no duties or obligations on any tenant whatsoever. Unfortunately, the Petitioners have now resorted to blatant misrepresentation of the facts and the City's conduct in support of this last appeal in the desperate hope that this Court will come to a conclusion different from the three state courts and a federal court below, each court finding that the Ordinance is a valid exercise of the City's licensing authority that does not violate the constitutional rights of any person.

The Petitioners have presented no compelling reasons for this Court to grant the Petition and have failed to meet their burden in demonstrating such

reasons. Accordingly, this Court should deny the Petition.

STATEMENT OF THE CASE

I. Factual Background

Ordinance 3231 is a business licensing regulation enacted by the Respondent City for the purposes of protecting the public health, safety and welfare of the citizens, especially tenants who reside in dangerous substandard housing. Pet. App. 124. The Ordinance was adopted following a series of investigations, public hearings, public meetings and consideration of significant volumes of testimony and evidence. R. 346; Pet. App. 124. The Ordinance imposes the following regulatory requirements on landlords:

> . . . License Required. No person shall make available for rent, or rent, lease, or let, to the public any residential dwelling unit . . . without securing and maintaining a current business license as required by this title.
>
> . . . Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, the applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant including:

1) structural members that are insufficient in size or strength to carry imposed loads with safety;

2) exposure of occupants to the weather;

3) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury;

4) lack of water, including hot water;

5) heating or ventilation systems that are not functional or are hazardous;

6) defective, hazardous, or missing electrical wiring or electrical service;

7) defective or inadequate exits that increase the risk of injury to occupants;

8) violations that increase the risks of fire; or

9) violations of other applicable codes, rules or regulations.

Pet. App. 126-27.

The Ordinance also establishes a license fee, a renewal period and provides a list of qualified persons whom a landlord may retain to complete the required certificate of inspection when the business license is renewed every two years. Pet. App. 127-28. The certificate of inspection may be completed by any of the following persons using a City approved form:

1) a City of Pasco Code Enforcement Officer;

2) inspectors certified by the United States Department of Housing and Urban Development for grant-required inspections;

3) certified private inspectors approved by the City upon evidence of completion of formal training including the passing of an examination administered by the National Association of Housing and Redevelopment Officials, the American Association of Code Enforcement or other comparable professional association as approved by the director of community development which approval or denial shall be subject to appeal to the Code Enforcement Board;

4) a Washington licensed structural engineer;

5) a Washington licensed architect.

All inspection certifications shall be submitted on forms provided by the City or approved by the United States Department of Housing and Urban Development.

Pet. App. 128-29.

The Ordinance merely imposes business licensing requirements on any person who wants to rent dwelling units to the public. Contrary to the assertions made by Petitioners, the business licensing forms are not used for the purpose of citing the landlord or the tenant for building code violations. Nowhere in the Ordinance is there any provision for the issuance of a Notice of Violation simply because a property fails a licensing inspection. The enforcement

provisions cited by the Petitioners as "evidence" of government action relate only to the failure of an individual to properly obtain a business license or for providing false information in a business license application. Pet. App. 129-30.

No City employee is ever involved in the landlord's licensing certification process unless the landlord asks the City Code Enforcement Officer (one of five different inspector options available) to perform the inspection for the landlord's benefit. If any inspector retained by a landlord is unable to certify that the dwelling unit complies with the standards set forth in the Ordinance, then the landlord merely corrects the deficiency, has the property re-inspected, and obtains a certificate of inspection. This is true regardless of whom the landlord has chosen to perform the inspection. Indeed, when a landlord hires someone other than the Code Enforcement Officer to complete a certificate of inspection, no City employee will ever learn of a failed inspection unless the landlord notifies the City that a dwelling unit failed to pass the certification inspection.

Nothing in the Ordinance places any obligations upon a tenant. It does not require any action on the part of a tenant, does not require any interaction between a City official and a tenant unless the landlord facilitates the interaction, and does not impose any risk of penalty upon a tenant.

II. Correction of Factual Misstatements by Petitioners

At page 3 of the Petition, the following statement is made: "To initiate the enforcement process, the City notifies the property owners of the scheduled inspections, but gives no notice to the tenants. App. 124-31." This is inaccurate as demonstrated by a review of the cited pages in the Petitioners' Appendix.

The correct characterization of the Ordinance sections referenced by Petitioners is as follows: The City notifies the holder of a rental business license of the renewal period during which a landlord must obtain a renewal inspection and renew the business license. Renewal periods are assigned to all residential rental businesses at the time of an initial business license application on a rotational, quarterly basis. The actual inspection of the dwelling unit(s) in conjunction with an application for a new or renewal license must be conducted not more than ninety days prior to the date on the certificate of inspection. Pet. App. 127-28. The City has no role in the scheduling of the inspection of a dwelling unit, unless the landlord has requested the services of the City Code Enforcement Officer to complete the landlord's certificate of inspection. If a landlord chooses to retain a City employee to complete the certificate, then there will obviously be coordination between the landlord and the City employee to schedule the inspection at a mutually convenient time. However, the landlord is solely responsible for scheduling the visit to a

tenant's unit, assuming the unit is occupied during the entire ninety day window of opportunity.

The following statement at page 3 of the Petition is also inaccurate: "The inspections are conducted by a City-employed or City-approved inspector. App. 128-29." A correct statement of the Ordinance terms is that the City provides at least five options for a landlord to choose from in hiring an inspector to prepare the certificate of inspection, one of which includes the City Code Enforcement Officer. Other options include engineers or architects licensed by the State of Washington, inspectors approved by the United States Department of Housing and Urban Development, or other inspectors with credentials from professional associations. If a professional association is not listed, the landlord may seek approval from the City's Director of Community Development and the approval or denial of that request is subject to appeal to the City's Code Enforcement Board. Pet. App. 128-29.

At page 4 of the Petition, the Petitioners assert "factual" statements regarding the lack of provision of notice or hearing by the City to the tenants. Again, this inaccurately implies that the City has a role in the relationship between the landlord and the tenant or a required role in the actual scheduling or performance of the inspection. It further implies that the Ordinance governs or controls the actions or property of a tenant. It does not, as set forth in detail in the arguments presented below.

Finally, page 4 of the Petition contains the statement that the Ordinance denies a landlord who is in violation of the licensing requirements a hearing before enforcement or penalties attach. This is simply not true and misleads this Court. The Ordinance itself merely describes the penalty for violation and does not contain the procedure for enforcement of its terms because it is only one portion of an entire Business License Title of the City Code dealing with administrative regulations of the City, which includes a hearing before the City Council prior to revocation of a business license. As demonstrated by this very case, the City must initiate court action to prevent a non-licensed landlord from continuing to operate a rental business without a license and it is a court that ultimately imposes a fine for such violations after a hearing on the merits.

III. Procedural Background

In the instant case, Petitioners Shaw hired a private inspector who declined to certify their rental units as being in compliance with the Uniform Housing Code. RP 379-81; 386-92. The Shaws ultimately asked the City Code Enforcement Officer to inspect their dwelling units and then claimed that certain tenants refused to allow the landlord to enter their units with the City employee. The City made no attempt to enter or inspect those units without the permission of the landlord and the tenant. Pet. App. 153-54. When the Shaws did not provide the required certificate to the City, their business license was not

renewed, but the Shaws continued to operate their rental business without a license. Pet. App. 174-75. The City then initiated this state court action to enjoin the Shaws from operating the rental business without a license and to seek the imposition of civil penalties for violation of the City ordinance requiring a valid business license. Pet. App. 173-78.

The Shaws and the remaining Petitioners filed a concurrent federal action claiming that the ordinance was unconstitutional on its face and violated the Fourth and Fourteenth Amendment rights of landlords and tenants. The United States District Court for the Eastern District of Washington entered summary judgment in favor of the City on all of Petitioners' claims. Pet. App. 93-106. Petitioners then appealed to the Ninth Circuit.

The Ninth Circuit issued two orders in its reported decision. First, the Shaws' claims were dismissed outright under the *Younger* doctrine[1] because a) the City's state court action against the Shaws was pending at the time the federal suit was filed; b) the City has a "strong interest in its land-use ordinance and in maintaining habitable dwellings for its residents"; and c) the Shaws had an opportunity to pursue their federal claims in the state court proceeding. Pet. App. 70-71; *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001).

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

The Ninth Circuit then vacated the District Court's decision on the remaining claims of the tenants and the landlord association on the grounds of the *Pullman* abstention doctrine.[2] The Ninth Circuit determined that application of the *Pullman* doctrine was appropriate because a) the case touched upon a "sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open"; b) "interpretation of the validity of the Pasco Ordinance under the Washington Constitution may eliminate the need to determine whether it also violates the federal Constitution"; and c) the validity of the Ordinance under the State Constitution was uncertain. Pet. App. 73-74; *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d at 802.

Subsequently, the landlord association and the tenants were allowed to intervene in the City's equitable state action against the Shaws so as to allow the Washington courts to fully adjudicate all state and federal constitutional claims of all parties. Pet. App. 50-53. Every state court that has considered the Petitioners' claims has now upheld the Ordinance as a constitutional exercise of the City's licensing authority, denied the due process claim that the Ordinance is void for vagueness, and refused to find that the licensing requirement of a certificate of inspection turns a landlord's private inspector into a state actor

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[2] *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

thus implicating the Fourth Amendment requirement of a search warrant for a governmental administrative inspection under *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523 (1967). Pet. App. 1-25; 26-37; 47-49. Absent a finding of state action, it was never necessary for any of the lower courts to consider the Petitioners' remaining due process claim that the tenants must be provided with notice and an opportunity to object to a landlord's entry for the licensing inspection.

To the extent that the Petitioners are asserting the failure of the lower courts to consider the landlord's due process rights related to the denial or revocation of a business license, such a claim lacks substance and credulity in light of the procedural history of this very case. The only landlords to whom the penalty provisions of the Ordinance have been applied are the Petitioners Shaw. This action originated directly as a result of the City's attempt to enforce its rental business licensing ordinance in a court of law and it is this very proceeding which has afforded the Shaws all of the procedural and substantive due process they are due. To claim otherwise is ludicrous. *See* Pet. App. 42-46 (Franklin County Superior Court, Summary Judgment Order granting permanent injunction against Bernard and Jean Shaw).

REASONS FOR DENYING THE PETITION

First and foremost, the decision of the Washington Supreme Court below is a decision interpreting the privacy rights afforded to Petitioners under the Washington State Constitution. It is undisputed that Article I, Section 7, of the Washington Constitution provides its citizens rights that are broader than those provided under the Fourth Amendment. *State v. Carter,* 151 Wash. 2d 118, 85 P.3d 887 (2004); *City of Seattle v. McCready,* 123 Wash. 2d 260, 868 P.2d 134 (1994). What the Petitioners seek from this Court is a ruling that the highest court of the State of Washington improperly interpreted the privacy rights afforded citizens of the State under the State Constitution. Absent compelling reasons for this Court to interfere in the interpretation of a State Constitution by a State Supreme Court, the Petition should be denied.

Second, a court must first find the existence of state action before any federal constitutional rights are implicated under the Fourth Amendment or the Fourteenth Amendment. As every lower court has held, no state action exists in the City's licensing program for residential rental businesses.

The decision of the Washington Supreme Court on Petitioners' Fourteenth Amendment claim that Ordinance 3231 was void for vagueness is wholly consistent with the decisions of this Court and the Courts of Appeals. Further, in their facial challenge to the validity of Ordinance 3231, the Petitioners failed to establish the existence of any state action that

triggers a landlord or a tenant's Fourteenth Amendment due process rights of notice and an opportunity to be heard, thus there was never any basis for the courts below to consider such a claim.

Finally, none of the issues now presented by Petitioners implicate an important question of federal law that has not previously been decided by this Court, nor have the Petitioners demonstrated that the Washington Supreme Court decided a federal question in a manner that conflicts with another court. Accordingly, Petitioners have failed to meet their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE WASHINGTON SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S FOURTH AMENDMENT STATE ACTOR ANALYSIS

Throughout nearly a decade of enforcement and the proceedings below, the City has never taken the position that Ordinance 3231 authorizes entry by a governmental officer into a residential rental unit for purposes of issuing code enforcement citations. The Ordinance is merely a business licensing ordinance and does not implicate any person's Fourth Amendment right against an illegal search. The City has never attempted to enter a unit without the permission of the landlord and the tenant. As was the case with the Shaws' tenants, when the tenant objected to

the City's entry, the City employee refused to enter and inspect the premises for the landlord. If a tenant refuses to allow a landlord to enter the premises for his or her business purposes, it is incumbent upon the landlord to obtain entry into the premises using the legal process available under RCW 59.18.150. *See* Pet. App. 121-23.

Based on the plain and simple licensing requirements set forth in the Ordinance itself, every lower court has ruled that the business licensing requirement imposed on landlords by the ordinance does not violate the constitutional rights of any landlord or tenant, either under Article 1, Section 7, of the Washington Constitution or the Fourth Amendment. However, each lower court properly determined that the Petitioners could not establish the predicate requirement of state action that would trigger the substantive and procedural rights afforded by the Fourth and Fourteenth Amendments.

A. Washington State Law Requires A Search Warrant For Governmental Code Enforcement Inspections Of Residential Rental Units And Does Not Permit The Issuance Of Administrative Warrants For Suspected Civil Violations

The Ninth Circuit, in its analysis of the *Younger* and *Pullman* abstention doctrines in the related federal action filed by Petitioners challenging the Respondent's Ordinance, recognized that Article 1, Section 7, of the Washington Constitution affords

"more protection to its citizens than the federal Constitution" and "clearly recognizes an individual's right to privacy with no express limitations[.]" *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801, 803-804 (2001). As succinctly summarized by the Ninth Circuit:

> The Washington Supreme Court has determined that "[t]he relevant inquiry under the Washington [C]onstitution in determining whether there has been a search is 'whether the State has unreasonably intruded into a person's "private affairs."'" *State v. Young*, 123 Wash. 2d 173, 867 P.2d 593, 597 (1994) (en banc) (citation omitted). "The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry. Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. However, under the Washington [C]onstitution, the inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* (citations omitted).

Id. at 804, fn.6.

Applying the Fourth Amendment and Article 1, Section 7 principles set forth above, the Washington Supreme Court long ago confirmed that search warrants are required when the government seeks to search residential rental properties for code violations over the objection of a tenant. *City of Seattle v.*

McCready, 123 Wash. 2d 260, 271, 868 P.2d 134 (1994) ("*McCready I*"). In *McCready I*, the City of Seattle had obtained search warrants to inspect residential rental properties for code enforcement purposes, but the landlords challenged the probable cause standard used to obtain those warrants. *Id.* at 266-68. Thus, the initial issue on appeal was whether Article 1, Section 7 permitted Washington courts to apply the lesser administrative standard of probable cause for such a search warrant, as was permitted under the Fourth Amendment pursuant to this Court's decision in *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523 (1967). However, the Washington Supreme Court never reached the *Camara* question because it determined that the Superior Court issuing the warrants had no lawful authority to do so because the warrants had in fact been issued on less than probable cause (i.e. the *Camara* administrative probable cause standard) and no statute or court rule permitted a superior court to issue such warrants. The Washington Supreme Court held that an inspection of a residential rental unit for code enforcement violations by a government official, and over the objection of the tenant, invades "the tenants' private affairs and . . . no authority of law support[s] warrants to search for housing code violations absent probable cause." *McCready I*, 123 Wash. 2d at 280.

Subsequently, the City of Seattle began obtaining "administrative inspection warrants" based on probable cause that a civil infraction had been committed.

In *McCready II,* the Washington Supreme Court ruled that no state court has the inherent authority to issue search warrants based on probable cause that a civil infraction has occurred, and no statute or court rule existed which authorized such administrative search warrants absent probable cause of a criminal violation. *City of Seattle v. McCready,* 124 Wash. 2d 300, 309, 877 P.2d 686 (1994) ("*McCready II*"). The same conclusion was subsequently reached by the Washington Supreme Court applying only a Fourth Amendment analysis in *Bosteder v. City of Renton,* 155 Wash. 2d 18, 117 P.3d 316 (2005).

The *McCready II* court also addressed the landlords' objection to governmental searches conducted solely based on a tenant's grant of authority to the governmental agent. The landlords argued that only a landlord can authorize entry to a code inspection officer who sought entry to search for code violations. *McCready II,* 124 Wash. 2d at 304. The court held that the tenant's privacy right in the premises gave the tenants the right to authorize a government official the right to search both the rented premises and the common areas for code violations. *Id.* at 305-06.

Thus, the *Camara* Court's reasonableness standard for probable cause for administrative search warrants does not rise to the level of protection required by Article I, Section 7, of the Washington State Constitution. Based on this substantive and qualitative difference between Fourth Amendment jurisprudence and the protections afforded by the

Washington State Constitution, the Ninth Circuit in this case properly recognized that resolution of the state privacy right question would subsume and eliminate any question of whether the Ordinance also violates the Fourth Amendment. Pet. App. 83. The Petitioners apparently concurred in the Ninth Circuit's analysis until they lost their appeals at every stage of the State's review and now contend that the State court's analysis fails to comport with federal decisions on the Fourth Amendment.

The decision below is in no way inconsistent with the decisions of this Court or other federal courts regarding the warrant requirements under the Fourth Amendment. Rather, the court below thoroughly reviewed the broader protections afforded citizens in a landlord-tenant relationship under Article 1, Section 7, of the Washington Constitution as set forth in the *McCready* cases. That analysis subsumes and exceeds the Fourth Amendment protections set forth in *Camara* and *Chapman v. United States*, 365 U.S. 610 (1961), two cases upon which Petitioners heavily rely. However, unlike the Petitioners, the Washington Supreme Court promptly recognized the ultimate issue to be addressed:

> Because the *McCready* cases and *Bosteder* involved searches conducted by city inspectors, these cases do not answer the question presented here, whether the Fourth Amendment or article I, setion 7 is violated where a landlord and a privately engaged inspector

> inspect a rental property for code violations that impact health and safety.

Pasco v. Shaw, Pet. App. 10.

The lower court properly determined that a prerequisite to the analysis of whether a search warrant is required is a finding that a state actor is involved. This is wholly consistent with the decisions of this Court and the Courts of Appeals and the Petitioners have not demonstrated any conflict between this Court's analysis of state action and the analysis applied by the Washington Supreme Court.

B. The Washington Supreme Court Correctly Decided That No State Action Occurs When A Landlord Inspects Or Arranges For Inspection Of A Rental Property For Purposes Of Obtaining A Business License From A City

Petitioners attempt to dodge the central issue of state action by simply not raising it in any of their questions presented and by arguing primarily that a warrant is required because the City requires a landlord to provide it with the certificate of inspection. Every lower court to face this issue has correctly and plainly stated that the protections of the Fourth Amendment and Article 1, Section 7 are not implicated unless there is first a finding of state action. Pet. App. at 10, 12, 30, 31, 48. The fact that the business licensing requirement does not constitute state action has become the repeating and resounding

death knell to the Petitioners' inspection related Fourth or Fourteenth Amendment contentions:

> [U]nder the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license. Significantly, if a private inspector finds code violation, the ordinance does not require the inspector to turn his or her findings over to the city. Thus, a landlord can remedy any violations found by an independent inspector, submit to another inspection, and obtain a license based on the new inspection, without the city ever being notified of the original violations. The city insists only upon the certificate that an inspection has been successfully completed. Landlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance. In sum, the petitioners have not met their burden of showing that landlords and their privately engaged inspectors are state actors. Absent state action, neither the Fourth Amendment, nor article I, section 7 [of the State Constitution] was violated.

City of Pasco v. Shaw, Pet. App. 11-12 (emphasis in original).

It is a fundamental tenet of constitutional analysis that a claim for violation of the Fourth Amendment may only proceed if the claimant establishes the search is committed by the government, i.e., a state actor. *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S.

922, 924 (1982); *Camara*, 387 U.S. at 528 (Fourth Amendment rights are enforceable only when the search is conducted "by government officials"). The state actor requirement for Fourteenth Amendment claims is also well established in the jurisprudence of this Court. *Lugar*, 457 U.S. at 924 ("Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state action is an implicit predicate for the application of constitutional rights).

This Court has articulated four approaches to the question of whether conduct consists of state action: public function, state compulsion, nexus and joint action. *Lugar,* 457 U.S. at 937 (*e.g.*, the "public function" test, *see Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); the "state compulsion" test, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); the "nexus" test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); the "joint action" test, *see Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)). Which test or tests is appropriate will depend on the particular factual circumstances, however the underlying common thread to these tests is "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar,* 457 U.S. at 937. There "is no specific formula for defining state action," rather it is a "fact-bound inquiry" that turns

upon the circumstances of a particular case. *Id.* at 939; *Howerton v. Gabica,* 708 F.2d 380, 383 (9th Cir. 1983).

The Washington Supreme Court properly based its analysis below on the question of whether the action complained of by Petitioners can be fairly attributable to the state. *See Shaw,* 161 Wash. 2d at 459-62 (fully analyzing the state action question.) The court appropriately made its fact-bound inquiry based "on the circumstances of [the] given case." *Shaw,* 161 Wash. 2d at 460. As court after court has held, there is no state action involved in Ordinance 3231, thus there can be no violation of the Fourth Amendment.

1. Obtaining A Certificate For Purposes Of Operating A Business Is Not A Traditional Or Exclusive Public Function

Under the public function test a private party can be considered a state actor when it engages in a "traditionally exclusive governmental function." *Rendell-Baker v. Kohn,* 457 U.S. at 842; *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157-64 (1978). The only governmental function here is the requirement that a certain form of business obtain a license to operate that business. The governmental function ends there. However, as a condition of issuance, a private business owner must provide certain documentation to the City. For a residential rental business, the City requires presentation of a completed certificate of inspection. It is common practice for cities to require

other types of businesses to present other types of certifications before granting a business license – daycare centers must present certificates from the health department; beauticians must have a cosmetology license; commercial truck drivers must have a commercial driving license endorsement; lawyers, doctors and certified public accountants must pass licensing exams and provide proof of continuing education courses; teachers and school volunteers must pass criminal background checks – the list goes on and on. However, the mere requirement that the City receive a copy of a certification form does not automatically convert the person or entity who provided the landlord with that certification to the applicant into an agent acting on behalf of the City.

The Petitioner's public function argument fails absent evidence of the delegation of the City's code enforcement authority to the private inspectors. No such delegation occurs under this licensing program. Yet, the Petitioners attempt to prove the existence of a traditional governmental function by claiming that a landlord's affirmative act of requesting a City employee's assistance in obtaining the certificate of inspection is "conclusive of state action" because the person chosen by the landlord to perform the inspection is also a full-time employee of the City. Pet. for Cert. at 19.[3] This argument is boot-strapping at its

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[3] Citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. at 303; *West v. Atkins*, 487 U.S. 42, 50 (1988).

most egregious – the Petitioners simply cannot fabricate the existence of state action by claiming that the governmental function test has been met because the Petitioners personally invite a city employee to perform a business function for the landlord's own benefit. The Ordinance itself places no obligation on the landlord to use a City employee for the certification process. It is the landlord who exercises sole control over the extent and nature of the City's involvement in his business licensing inspection.

Furthermore, the inspector – whomever the landlord has retained – is not involved in issuing the actual business license. It is the landlord who obtains the certificate of inspection from the inspector, presents the certificate to the City's business license office and is then issued a license upon payment of the fee. If a landlord's hired inspector notifies the landlord that the dwelling unit cannot be certified in its present condition, then it is the landlord who simply fixes the defect and obtains a follow-up inspection. The City is never involved in the landlord's inspection process unless the landlord asks the City employee to be the inspector. If and when a City employee provides this additional service to the landlord, he is not acting within the scope of his traditional duty of code enforcement.

In their briefing on this issue, the Petitioners again misstate the facts in an attempt to shore up a shaky legal argument. The Petitioners claim that "the inspections are scheduled by the City, the extent of the inspection is dictated by the City, ... The City

requires the inspection results be reported back to the City for purposes of determining what action the City will take as the result of the inspection. . . ." Pet. for Cert. at 19-20. This is simply untrue and unsupported by the record, as demonstrated by the complete lack of citation for these "facts." As set forth in the Factual Background, *supra*, the City merely notifies a business license holder of an upcoming renewal period for an existing license. All responsibility for meeting the licensing requirements within the renewal period fall upon the license applicant, including the selection of a qualified inspector, scheduling of the inspection and submitting the properly completed certificate of inspection to the City's business license office. There is absolutely no evidence in this record to support a claim that the City takes "further enforcement action" against any landlord based on the information contained in a certificate of inspection submitted with a business license application. Indeed, it bears repeating that the City will only see a certificate of inspection after the dwelling unit(s) have been certified by the landlord's inspector. There is no evidence in the extensive record below to support a claim that the Code Enforcement Officer took "further enforcement action" or issued any notices of violation or civil infractions to any person as a result of the licensing certification process. The simple truth is that no such evidence exists because no such events occur. It is only the landlord that controls the outcome here.

2. The City Of Pasco Does Not Seize Decision-Making Power As To How To Comply With The Law

Under the compulsion test, the question is whether there is coercive influence or "significant encouragement" of the state that effectively converts a private action into a government action. *Kirtley v. Rainey*, 326 F.3d 1088, 1094 (9th Cir. 2002). Simply fulfilling a statutory duty is generally not considered state action when the private party has decision-making power over how to fulfill that duty. *Id.* Here, it is the landlord that decides all of the factors involved in fulfilling the duty to obtain a certificate of inspection. Therefore, there is not the requisite level of government involvement to find state compulsion. The landlord determines who will be retained to perform the inspection (and even has the opportunity to obtain approval of additionally qualified persons not listed in the Ordinance); the landlord determines when the inspection will be performed (i.e., when the unit is unoccupied or upon arrangement with a tenant); and the landlord ultimately determines whether the condition of the properties make it economically feasible to continue operating her business if substantial repairs are needed to obtain the certification from her chosen inspector.

The Petitioners' claim that coercion exists because the license is a condition of doing business in the City, yet a tenant can refuse to permit the landlord from entering a rented unit for purposes of meeting the business licensing requirement. This

argument goes against Washington's well-established rule that a tenant cannot unreasonably withhold consent for a landlord to enter under RCW 59.18.150 and a tenant has a limited privacy right in rented property because it is subject always to the landlord's right of entry. *Kalmas v. Wagner*, 133 Wash. 2d 210, 219-20, 943 P.2d 1369 (1997). The landlord's business purpose for entering a rented unit is to obtain a licensing certification. This is no different than a situation where a landlord needs entry into a tenant's unit to replace wiring, upgrade appliances or for any other business purpose. A tenant who absolutely does not want to permit a landlord entry (and one must question why that would be the case) always has the option of giving notice to the landlord and the landlord has the ability to terminate the lease of an unreasonable tenant who refuses to allow him entry for business purposes and with the requisite notice.

3. There Is No Close Nexus When Private Landlords Arrange Business License Inspections Through Private Inspectors

The Petitioners fail to demonstrate the existence of a close nexus between the City and the landlords and inspectors. Furthermore, the Petitioners again rely on contrived facts in an attempt to strengthen their characterization of the relationship between the City and the landlord's chosen inspector. Under the nexus test, private action may be considered state action when "there is such a close nexus between the

State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351. However "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . ." *Id.* (holding that even actions of heavily regulated utility companies are not state action when they terminate service to customers); *Moose Lodge 107 v. Irvis,* 407 U.S. 163, 176-77 (1972) (holding that the actions of a highly regulated vendor of alcohol are not necessarily state action without something more).

Here, Petitioners contend that the City's minimal description of the standards for issuance of the certificate of inspection converts private inspectors into state actors. This Court explicitly rejected the notion that regulation alone creates the nexus needed for state action in *Jackson* and *Moose Lodge.* Furthermore, as noted *supra,* the Petitioners blatantly misstate the facts, claiming that the City schedules the inspections and evaluates the inspections for compliance. The City has no such involvement. The City's only involvement is to receive the successfully completed certificate of compliance as a prerequisite to issuing a business license. Under the Ordinance the City is never notified of code violations or failed inspections. The landlord may make the required changes to become compliant and obtain a passing certificate without any City involvement whatsoever. In the event that the landlord has requested the services of the City Code Enforcement Officer in

completing the certificate of inspection, the same process will be followed – the inspections are never used for the purpose of issuing notices of violation or civil infractions, they are merely provided as a service to the landlord and are available only upon request. These facts do not support the nexus required between the city and any inspections.

4. The City Of Pasco Has No Contractual Relationship, Actions In Concert, Or Conspiracy With Landlords And Inspectors

Petitioners fail to show that there is any conspiracy, actions in concert, or contractual relationship as required under the joint action test. Under the joint action test, the question is whether a private party "has engaged in a conspiracy or acts in concert with state agents to deprive one's constitutional rights." *Gonda v. Gray,* 707 F.2d 435, 437 (9th Cir. 1983). This type of state action is typically found when there is an actual contract between the state and the private parties to form a symbiotic relationship. *Burton v. Wilmington Parking Auth.*, 365 U.S. 830 (1961) (state action was found where a small vendor contracted with the government to operate on the premises of a federal building and engaged in discriminatory conduct).

The facts of this case simply do not support a claim of joint action. Rather, private landlords are solely responsible for choosing the means by which a

certificate of inspection is obtained and can do so with no involvement from the City whatsoever. Indeed, the use of a City Code Enforcement Officer is only one of at least five different options for obtaining the certificate. The City has no contractual agreements with the other types of inspectors available to the landlord and there is no requirement that the inspectors have any form of relationship or ties to the City.

The lower court properly held that the business licensing requirement imposed on landlords by the Ordinance does not violate the constitutional rights of any Petitioner landlord, tenant or business association, either under Article 1, Section 7, of the Washington Constitution or the Fourth Amendment because it does not implicate state action. Petitioners fail to demonstrate any compelling reason for this Court to grant their Petition, nor have Petitioners demonstrated any conflict between the holding of the Washington Supreme Court and other federal courts in regards to Fourth Amendment warrant jurisprudence.

II. THE WASHINGTON SUPREME COURT CORRECTLY APPLIED THIS COURT'S VOID FOR VAGUENESS STANDARD AND UPHELD THE ORDINANCE.

The Petitioners contend that the Washington Supreme Court did not follow this Court's precedent when evaluating Ordinance 3231 on a void for vagueness challenge, while proposing a fatally incomplete standard themselves. The lower court expressly

stated that the Petitioners did not meet their "heavy burden of showing vagueness beyond a reasonable doubt." Pet. App. 15. The Washington Supreme Court appropriately applied the standard set forth in 1926 by this Court in *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) and quoted by the Washington Supreme Court in *Haley v. Med. Disciplinary Bd.*, 117 Wash. 2d 720, 739, 818 P.2d 1062 (1991) ("An ordinance is unconstitutionally vague if 'persons of common intelligence must necessarily guess at its meaning and differ as to its application.'") Pet. App. 14. The court applied the appropriate rule of law to the facts presented and recognized that the clear directions in the Ordinance combined with the lack of any confusion as to how to apply the nine standards set forth in the Ordinance demonstrated that it is not unconstitutionally vague. Pet. App. 14-15.

As summarized by this Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a municipal ordinance "is void for vagueness if its prohibitions are not clearly defined." 408 U.S. 104, 108 (1972). Thus, an ordinance will pass the test for vagueness if it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly[;]" avoids "arbitrary and discriminatory enforcement" by providing "explicit standards for those who apply them" without "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

Here, the Ordinance first provides a broadly stated standard of conformity with the Uniform Housing Code, a code widely adopted throughout the nation and replete with detailed specifications for construction and maintenance of buildings. The Ordinance then goes on to specify nine examples of code compliance that should be reviewed by an inspector in making his or her certification. The only listed example about which Petitioners complain is the final listed criteria of "violations of other applicable codes, rules or regulations," contending that the language "fails to identify an objective standard against which both owners and tenants might measure their conduct." Pet. for Cert. 26-27. As has been noted above repeatedly, the Ordinance does not regulate tenant conduct in any way, shape or form. That argument fails on its face.

Further, this Court has established that governmental ordinances challenged for vagueness on grounds other than the First Amendment should be examined on an as applied basis only and not as a facial challenge. *Maynard v. Cartwright,* 486 U.S. 356, 361 (1988). Thus, Ordinance 3231 must be evaluated for vagueness in light of the actual conduct of the parties challenging its validity here and not through hypothetical conjecture about what an inspector might do in the course and scope of an inspection obtained by a landlord for purposes of completing his or her business license application. *Id.*

Analyzing the Ordinance as applied to the Shaws demonstrates its validity and clarity of direction. The

Shaws have demonstrated that they know exactly what the ordinance requires of a landlord in order to obtain a residential rental business license from the City of Pasco. The Shaws recognize they must submit certification to the City's licensing office that their residential rental properties comply with the Uniform Housing Code and do not contain conditions that endanger or impair the health or safety of a tenant. The standardized forms required by the City for use by persons conducting a certification inspection provide the requisite uniform and consistent application of the Uniform Housing Code standards, and of any other codes, rules and regulations adopted by the City and applicable to the occupancy of a residential building. The real issue here is that the Shaws can not make this certification, because the rental properties of the Shaws presented some of the worst examples of substandard and unsafe properties, a fact borne out by the record and noted by the Washington Supreme Court in its opinion. Pet. App. 2-3; RP 386-93.

III. THE PETITIONERS' QUESTIONS OF DUE PROCESS FOR TENANTS WERE NEVER RAISED BELOW AND SHOULD BE DISMISSED OUTRIGHT

As a general rule, an appellate court will not hear on appeal issues that were not clearly raised in the proceedings below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106 (1976); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Walters v. City of St. Louis, Mo.*, 347 U.S.

231 (1954). "This rule ensures that 'parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" *Boggs v. West,* 188 F.3d 1335, 1337-38 (Fed. Cir. 1999) (citing *Singleton v. Wulff*, 428 U.S. at 120) (quoting *Hormel v. Helvering,* 312 U.S. at 556).

Further, this Court requires Respondent to bring to its attention questions presented that involve issues considered by the appellate court, but never first raised or decided at the district court. Sup. Ct. R. 15.2; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (if objection is not raised, the appellate procedural defect will be deemed waived, and the Supreme Court can accept for review those Questions Presented that arguably were never originally preserved for appeal); *Canton v. Harris*, 489 U.S. 378, 385 (1989). For the first time in nearly a decade of legal proceedings with the Respondent, the Petitioners now raise questions regarding the Fourteenth Amendment due process rights of tenants that were not decided or briefed before the Washington Supreme Court.

Petitioners claim for the first time in their Petition to this Court that tenants are entitled to notice from the City and an opportunity to be heard prior to a landlord's entry into a dwelling unit. The Petitioners have never contended that the City denied the tenants' constitutional right to notice or an opportunity

to be heard, nor have they ever briefed and argued this position.

In their Assignments of Error below, the Petitioners simply broadly asserted that the Ordinance "violates the due process clause of the Fourteenth Amendment. . . ." Brief of Appellants, Assignment of Error #3, *City of Pasco v. Shaw*, 2004 WL 3762311. In their briefing below, the Petitioners argued that the tenants are the only persons who have a privacy right in the apartment units, thus only the tenant can consent to a search of the premises. *Id.* at 19-20. There is no mention of the claim that a tenant has a due process right to notice from the City, much less a hearing in front of the City, prior to a landlord conducting a business license inspection of the unit. Indeed, such an argument flies in the face of the landlord's statutory right of entry and would seemingly lead to a rule of law that deprives a landlord from ever entering an occupied rental unit. Regardless, the Ordinance on its face and as applied, places no obligations for compliance or action on the part of any tenant and merely regulates the issuance of a business license to a landlord. The Ordinance does not implicate the rights of a tenant living in a rental property any more so than a grocery store's business license implicates the rights of a customer shopping in the store.

As an argument that was not briefed and argued below, it comes as a complete surprise to the Respondent now. In accordance with the established judicial policy of fairness to the parties to properly defend

against a claim, this Court should decline to address this new claim. *Singleton,* 428 U.S. at 120 ("We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.").

CONCLUSION

The Petitioners fail to present compelling reasons for this Court to grant review of any issue presented. The lower court's opinion is not in conflict with the decisions of this Court or any Court of Appeals on any matter and wholly fails to demonstrate the existence of any federal question that has not been settled by this Court. Accordingly, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BERNARD N. SHAW and B. JEAN SHAW, COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA, and MARIA GALEANA,
Petitioners,

v.

CITY OF PASCO,
Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF AMICUS CURIAE OF RENTAL HOUSING ASSOCIATION OF PUGET SOUND AND THE WASHINGTON MULTI FAMILY HOUSING ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE OUT OF TIME

The Amici identified below previously filed a brief that followed the formatting as set forth in the Court's prior rules. This brief is identical in substance to the previously filed brief. However, the Amici have re-printed the brief with changes to type size and font so as to conform to the Court's new rules. The Amici respectfully request that leave be granted to file the re-printed brief.

IDENTITY AND INTEREST OF AMICI

This brief is filed on behalf of the Rental Housing Association of Puget Sound and the Washington Multi Family Housing Association. The parties to the litigation have provided written consent to the filing of this brief, which consent has been lodged with the Clerk of the Court. [1]

The Rental Housing Association of Puget Sound ("RHA") is the largest association of rental housing owners in the Pacific Northwest, representing more than 4,400 members. RHA has appeared as an intervenor and *amicus* in numerous state administrative and appellate court proceedings involving the regulation of rental dwellings. The RHA participated as an amicus in the proceedings before the Washington Supreme Court.

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[1] Counsel for amici prepared this brief in whole, and no person or entity other than the amici provided any funding for the preparation or filing of this brief.

The Washington Multi Family Housing Association is the Washington chapter of the National Apartment Association and represents over 50 management companies encompassing over 62,000 apartment homes.

The interest of the amici in this case stems from the organizations' long-standing interest in licensing and inspection regulations for residential rental units. The amici are concerned that the City of Pasco's ordinance requiring searches of residential dwellings without a warrant or tenants' consent places landlords in an untenable position: their business licenses are conditioned upon tenants waiving their personal constitutional right to privacy.

STATEMENT OF THE CASE

The amici contend that the Washington Supreme Court decision allows government to circumvent the requirements of the Constitution by forcing private citizens to conduct searches where a search warrant would otherwise be required. In other words, the City of Pasco seeks to do indirectly what it cannot constitutionally do directly.

The key issue is what constitutes "state action" for purposes of the Fourth Amendment.

The issue stems from a City of Pasco ordinance that requires landlords to obtain and maintain a business license as a prerequisite to engaging in the residential rental business. Pet. for Writ of Cert., Appendix (App.) at 126 (Pasco Municipal Code ("PMC") § 5.78.010).

Before the City will issue the license, the landlord must provide a "certificate of inspection." *Id.* (PMC § 5.78.020(a)). The license must be renewed every two years, and the certificate of inspection (based on a new inspection) must also be resubmitted at each renewal. *Id.* at 127-28 (PMC § 5.78.020(b)).

The inspection is required even though there is no probable cause of any code violation. Likewise, inspections are required over the objection of the existing tenant. Rather than requiring an inspection when a tenant moves out—that is, during the period of vacancy between tenants—the Pasco ordinance requires existing tenants to succumb to inspection.

The inspection is carried out by the city's Code Enforcement Officer or by a qualified private inspector selected by the of the landlord, but approved by the City.

In its decision, the Washington Supreme Court stressed that the ordinance "does not authorize the city **itself** to search for housing violations." *City of Pasco v. Shaw*, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007), reproduced at Pet. for

Cert., App.11 (emphasis added). Instead, the Court viewed the inspections as furthering a private purpose of obtaining a business license.

> [U]nder the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license.

Id. (italics in original).

The Washington court's reasoning continued:

> The city insists only upon the certificate that an inspection has been successfully completed. Landlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance.

Id., 161 Wn.2d at 461, App. at 12 (italics in original).

While the landlords obviously want to secure a business license, it is Pasco that created the need for that license. It is also Pasco that conditioned license issuance on completion of an inspection. The dissent by Justice Sanders recognized both of these points, reasoning:

> Even though the ordinance allows landlords the option to utilize private inspectors approved by the city, private inspectors are simply doing the work of city inspectors. This is state action ...

161 Wn.2d at 467 (Sanders, J., dissenting); App. at 20. The dissent continued:

> The majority claims, however, private inspectors are merely furthering the "*private* objective of obtaining a certification needed to maintain a business license." Majority at 10. The business license requirement is imposed by the government. Moreover, landlords are coerced into complying with these unwanted intrusions into private residential units to further the government's objective of compliance with health and safety codes. The landlords are not "first and foremost furthering their *own* ends" .... but are actually furthering the city's ends.

161 Wn.2d at 469 (Sanders, J., dissenting); App. at 24.

The amici contend that the clear purpose of Pasco's ordinance is to increase compliance with city housing codes, not to benefit the landlord. *See* Pet. for Writ of Cert. App. 124 (preamble to Pasco Ordinance No. 3231). Here's the rub: unless the occupant consents, the City cannot inspect private dwellings without a warrant issued on probable cause of a code violation. Thus, under the ordinance, the city seeks to force the landlord to perform the searches for the city.

The issue presented here goes a step beyond *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). There, this Court held that administrative searches "are significant intrusions upon the interests protected by the Fourth Amendment, that such searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534.

Clearly, then, if Pasco wished to inspect rental dwellings in compliance with the Fourth Amendment, it must first obtain tenant consent, or obtain a search warrant under this Court's holding in *Camara*. Trying to circumvent this requirement, the City, by way of the business licensing process, compels private landlords to perform inspections as a condition to doing business. The primary question of this appeal is whether a private inspection performed under this kind of governmental compulsion is properly attributed to the City for

purposes of the Fourteenth Amendment's state action requirement.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Washington upholds these inspections because they are ostensibly "private." That decision conflicts with precedent of the United States Court of Appeals for the Ninth Circuit. The result is to leave landlords in the impossible predicament of choosing to forfeit their right to conduct business by loss of a necessary license, or choosing to violate their tenants' privacy rights under the Fourth Amendment. This Court should grant certiorari to resolve this split and provide clear direction regarding the Fourth Amendment's applicability to landlord searches of tenants' homes at the direction of the state.

I

THE DECISION OF THE WASHINGTON SUPREME COURT UPHOLDING SO-CALLED "PRIVATE" SEARCHES CONFLICTS WITH NINTH CIRCUIT PRECEDENT IMPUTING PRIVATE ACTION TO THE GOVERNMENT WHEN PERFORMED AT THE GOVERNMENT'S BIDDING

The protections of the Fourth Amendment prevent abuses of the government only, not of private

citizens. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.") (citation omitted).

Thus, to find a constitutional violation, the abuse in question must be attributable to "state action," the precise contours of which are not defined by formal distinctions. *Id.* This Court has stated the issue as follows:

> If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed.

Id. To hold the state responsible for private action, there must be a close nexus between the state and the action such that the action "'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The question of state action is highly fact specific:

"What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity."[2] *Id.*

One particular fact pattern this Court has recognized as constituting state action occurs when the state has

> exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (citations omitted).

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that

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[2] Lower courts have attempted to distill this Court's various cases on this topic into specific "tests" used to analyze state action. The Ninth Circuit, for example, uses four different tests: public function, joint action, governmental compulsion or coercion, and governmental nexus. *See, e.g., Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999). Even so, these courts recognize the fact intensive nature of the state action requirement: "Under any formula, however, the inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case." *Id.* at 836 (quoting *Bass v. Parkwood Hosp.*, 180 F.2d 234, 242 (5th Cir. 1999)).

> decision from the sphere of private choice.

Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).[3]

Following these guidelines, the Ninth Circuit has recognized that "[t]he Fourth Amendment applies to a search whenever the government participates in any significant way in this total course of conduct." *United States v. Davis*, 482 F.2d 893, 897 (9th Cir. 1973).

In *Davis*, the defendant was convicted of attempting to board an airplane with a concealed weapon. *Id.* at 895. The weapon was found during a routine search performed by an airline employee, not a government official. *Id.* at 896. The court noted, however, that the search "was part of a nationwide anti-hijacking program conceived, directed, and

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[3] In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), for example, this Court examined regulations promulgated by the Federal Railroad Administration suggesting that private railroads test employees who violate safety standards for alcohol use. 489 U.S. at 606. Even though the regulations were not mandatory, this Court determined that these "private" tests were not "primarily the result of private initiative." *Id.* at 615. Rather, the government's "encouragement, endorsement, and participation" were sufficient "to implicate the Fourth Amendment." *Id.* at 615-16. In the same way, the inspections performed by landlords pursuant to the City's ordinance are not done primarily from private initiative, but rather at the "encouragement" (compulsion, rather) of the local government. In both instances, the Fourth Amendment is implicated.

implemented by federal officials in cooperation with air carriers," *id.* at 897, and concluded that the search was attributable to the government: "It makes no difference that the act of opening appellant's briefcase was accomplished by a 'private' airline employee rather than a 'public' official," *id.* at 904. Significantly, the court reasoned that

> [c]onstitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by 'private' persons or entities that is prohibited to the government itself.

Id. (emphasis added).[4] That result, amici submit, is precisely what happens under Pasco's inspection ordinance.

Justice Sanders in dissent correctly acknowledges:

> Pasco **instigates** and encourages these searches, **dictates** their scope, and **examines** their fruits. The housing code inspection not only **occurs at Pasco's demand**,

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[4] The Ninth Circuit reaffirmed this rule in *United States v. Ross*, 32 F.3d 1411, 1413-14 (9th Cir. 1994), in which it again applied the Fourth Amendment to a search of airline luggage by a private airline employee, finding the private action attributable to the government.

> but the ordinance also rigidly lays out who can perform the inspections ... Given such extensive government involvement, the physical search need not be done by an actual city employee to trigger constitutional protections.

Pasco v. Shaw, 161 Wn.2d at 468 (Sanders, J., dissenting) (emphasis added); App. at 22-23.

The Supreme Court of Washington disregarded the extensive government involvement in the City's inspection scheme, and reached precisely the opposite result dictated by Ninth Circuit precedent. This Court should grant a writ of certiorari to resolve this split of authority and provide clear direction for Washington's landlords with respect to inspections of their tenants' homes.

II

THIS APPEAL PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT HAS NOT, BUT SHOULD, DECIDE

The ramifications of the Supreme Court of Washington's analysis in this case are far reaching. Under the majority opinion, the government can condition the issuance of a necessary license on the performance of actions that the government cannot constitutionally perform itself. There is no reason to suppose that governments will not seize upon this

new power to create new conditions for other types of licenses. Numerous problems facing society can be addressed by the licensing process, and the government can hide with impunity behind so-called "private" actors who do the government's bidding while supposedly acting in their "own" best interest of securing the license. This Court should decide whether this practice withstands constitutional scrutiny.

Already, the Washington decision is having practical impacts. The City of Seattle has recently passed a resolution to review the Pasco ordinance with an eye towards adopting a similar measure. City of Seattle Resolution No. 31031, Dec. 17, 2007. The amici understand that numerous jurisdictions in Washington are waiting to see what happens in this Court. If allowed to stand, the "state action" requirement will effectively be circumvented and thousands of tenants will soon be subjected to unconstitutional invasions of their homes. This Court should grant review and determine whether the Pasco ordinance goes too far.

CONCLUSION

The Supreme Court of Washington's decision in this matter creates a conflict with Ninth Circuit precedent construing the "state action" predicate to the application of the Fourth Amendment. Absent tenant consent, searches performed at the behest of

the government, and for the government's benefit, presents a federal issue of substantial importance that this Court should decide.

For the foregoing reasons, *amici* respectfully request this Court to issue a writ of certiorari to the Supreme Court of Washington in this matter.

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Respectfully submitted,

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